FILE NO.: 10CVD1231
FILM NO.:
IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

BENJAMIN EDWARDS and LYNN OWENS, OWNERS OF "LIVE"; GEORGE BEAMAN, OWNER OF "CLUB 519", "5TH STREET DISTILLERY" AND "MAC BILLIARDS"

Petitioners,

v.

PITT COUNTY HEALTH DIRECTOR

Respondent.

MEMORANDUM OF LAW

NOW COMES, the Petitioners Benjamin Edwards and Lynn Owens, owners of "Live" and George Beaman, owner of "Club 519", "5th Street Distillery" and "Mac Billiards", by and through their attorney of record,

INTRODUCTION

Several Petitioners have been, or expect to be, cited for violating North Carolina's new law which prohibits smoking in enclosed areas of restaurants and bars, with some exceptions. The statute, N.C.G.S. § 130A-491 et seq., went into effect on January 2, 2010. The Petitioners, are private clubs open only to members who pay a fee to be members. In accordance with N.C. Gen. Stat. §18B-1000(5) defines a "private club" as follows:

> "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..."

Where as N.C.G.S. § 130A-492 excludes the Petitioners from private club status. The

Petitioners are for-profit businesses, as opposed to non-profit entities such as private country clubs.

ARGUMENT

N.C.G.S. § 130A-491 Et Seq., In Exempting Nonprofit Private Clubs, Including Country Clubs, From Its Prohibitions, While Not Exempting For-Profit Private Clubs, Violates The Petitioners' Right To Equal Protection Under The United States And North Carolina Constitutions.

N.C.G.S. § 130A-496(a) sets forth a general prohibition against smoking in all enclosed areas of restaurants and bars, except as provided in N.C.G.S. § 130A-496(b). The only pertinent exception is in N.C.G.S. § 130A-496(b)(3), which provides an exception for "A private club." "Private club" is defined in N.C.G.S. § 130A-492(11) as follows:

> 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.

Although the Petitioners otherwise are private clubs as that term is generally known, they do not come within the above-quoted exemption for "private clubs" because they are for-profit businesses. In contrast, nonprofit private clubs, and country clubs, in particular, are exempt from the general prohibition on smoking in restaurants and bars that is set forth in N.C.G.S. § 130A-496(a). This difference in treatment between these two groups has no rational connection to any legitimate governmental purpose sought to be achieved by the subject legislation. Accordingly, it violates the Petitioners' right to equal protection under the law.

The term "country club" is not defined anywhere in the new statute or in North Carolina

case law. However, in *Amberley Swim & Country Club, Inc. v. Zoning Bd. of Appeals of Amberley*, 117 Ohio App. 466, 191 N.E.2d 364 (1963), a zoning case, the court stated that a "country club," as a permitted use under a zoning ordinance, contemplates a golf course as a principal if not a necessary adjunct. Accordingly, in that case, a privately owned subscription swim club with a pool, shelter house, parking area, and other incidental facilities did not constitute a "country club" within the meaning of a zoning ordinance permitting, among other things, country clubs and golf courses. In the instant case, then, it is very clear that none of the Petitioners could be considered as "country clubs," and that they therefore may not operate with the benefit of the exemption that is available for country clubs.

The legislative findings and purposes for the new smoking law are 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.

The above-quoted legislative findings and purposes are not served by exempting enclosed areas of private country clubs while prohibiting smoking in enclosed areas of private clubs that happen to be for-profit entities. Both classes of entities have similar enclosed areas, and similar numbers of individuals, whether they be members, guests, or employees. The status of one class as nonprofit and the other as for profit, has no bearing whatsoever on accomplishment of the public health purposes of the legislation at issue. Even if the nonprofit or for-profit status of a

private club has some significance for other, unrelated purposes, it has no significance whatever in the context of regulating smoking in enclosed places. In any event, the Petitioners' establishments are no less "private clubs," as that term is normally construed, than are country clubs. *See People v. Morse*, 27 Misc. 2d 1, 215 N.Y.S.2d 997 (N.Y. City Ct. 1960) (a membership corporation operating a club and billiard room for dues-paying members was a "private club" so as to be exempt from Penal Law provisions requiring licenses for billiard rooms and precluding persons under the age of 18 from entry).

Accordingly, as is discussed in more detail, *infra*, under even the somewhat- deferential rational-basis equal-protection analysis that applies, the exemption for "private clubs," as defined in the law, including country clubs, renders the law unconstitutional and unenforceable as applied to for-profit private clubs.

The Equal Protection Clause in the Fourteenth Amendment to the United States Constitution has its state law counterpart in N.C. Const. Art. I, 19 (the "law of the land" clause), which states, in part, that "[n]o person shall be denied the equal protection of the laws." The Fourteenth Amendment and the North Carolina Constitution's law-of-the-land clause are interpreted coterminously. *Munn-Goins v. Bd. of Trs. of Bladen Cmty. Coll.*, 658 F. Supp. 2d 713 (E.D.N.C. 2009) (citing cases).

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; thus, plaintiffs can establish an equal protection claim by showing that they were intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Benham v. City of Charlotte*, 2010 WL 143719

(W.D.N.C. 2010).

When determining whether a rational basis exists for application of a law, a court must determine whether the law in question is rationally related to a legitimate government purpose; that is, the government's objective must be legitimate, and the means used by the government must be reasonable to serve that legitimate goal. *In re R.L.C.*, 361 N.C. 287, 643 S.E.2d 920 (2007). To be irrational in the Constitutional sense, the relationship of classification challenged on equal protection grounds to its goal must be so attenuated as to render the distinction arbitrary. *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290 (4th Cir. 2007). Irrational classifications, or laws motivated by a desire to harm an unpopular group, fail rational-basis scrutiny. *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999).

In *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 478 S.E.2d 528 (1996), the court ruled that, assuming it had statutory authority to regulate smoking in public, a county board of health exceeded its rulemaking powers by usurping legislative power to make policy-based distinctions when it adopted smoking control rules that distinguished among small and large restaurants, bars, and public places being rented for private functions based on factors other than public health, such as economic hardship and difficulty of enforcement, which resulted in disparate treatment of similarly situated patrons, employees, and commercial establishments. The plaintiffs, municipalities and taxpayers, demonstrated that the smoking-control rules promulgated by a county board of health were invalid. Like the "private club" exemption challenged here, the exceptions in *Peedin* were unattributable to health-related factors. Accordingly, the plaintiffs were entitled to summary judgment when the defendants failed to raise an issue of fact as to any health-related basis for disparate treatment of similarly situated establishments. While *Peedin* was directly concerned with regulations promulgated pursuant to

legislation, rather than the legislation itself, the case nonetheless underscores the basic principle that distinctions made between regulated entities and those that are granted exemptions from smoking regulations must be well grounded in public-health considerations. Police power as exercised by the government is subordinate to equal-protection guarantees of the Federal and State Constitutions, and the mere assertion in legislation that it is for the public welfare is not enough, in and of itself to bring the ordinance within a valid exercise of the police power. *Town of Atl. Beach v. Young*, 307 N.C. 422, 298 S.E.2d 686 (1983).

There is North Carolina case precedent for striking down unconstitutional disparate treatment of entities similar to the Petitioners in this case. The Supreme Court of North Carolina has held that an ordinance which created a Sunday ban on the operation of billiard halls, but on no other businesses which provide facilities and opportunities for recreation, amusements, and sports, denied equal protection to the operators of billiard halls. *State v. Greenwood*, 280 N.C. 651, 187 S.E.2d 8 (1972). In relation to the ordinance's apparent purpose, which was promoting Sunday as a day of rest, tranquility, and relaxation, there was no rational basis for placing billiard halls in a unique class, separate and apart from all other businesses which offer facilities and opportunities for recreation, sports, and amusements. While the federal and state Equal Protection Clauses do not require perfection in respect of classifications, they do impose upon lawmaking bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found.

A pesticide manufacturer stated an equal-protection claim against the Environmental Protection Agency ("EPA") based on its refusal to cancel its registration, at the request of the manufacturer, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), for failure to pay annual registration maintenance fees, while canceling other registrations where registrants

had failed to pay the same fees. *Syngenta Crop Protection, Inc. v. U.S.E.P.A.*, 444 F. Supp. 2d 435 (M.D.N.C. 2006). Recovery on the equal-protection claim was dependent upon the manufacturer's establishment of facts showing that at least one registrant was "similarly situated," and that unequal treatment by the EPA was done intentionally or purposefully to discriminate against the manufacturer. Likewise, in the instant case, for all relevant purposes relating to the regulation or prohibition of smoking in enclosed places, private country clubs and private clubs like the Petitioners are similarly situated, yet the legislature has purposefully singled out country clubs for favored treatment and for-profit private clubs for disfavored status and treatment.

The allegation by tort victims that a city treated them arbitrarily and capriciously by asserting governmental immunity, when the city had a custom or policy of settling other similar claims, was sufficient to trigger constitutional review, under a lower-tier rational-basis test, to determine whether there had been a violation of the victims' right to equal protection (and substantive due process). *Dobrowolska ex rel. Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). The court noted that arbitrary and capricious acts by government are prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions, the purpose of which 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.

The different treatment complained of here between the Petitioners and country clubs also is prohibited under the well-established principle that statutes passed in the interest of the public health, safety, or morals are void as class legislation if made to apply arbitrarily only to certain persons or classes of persons or to make an unreasonable discrimination between persons

or classes. This principle was applied in *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968), where the court ruled that a city ordinance which prohibited a person from giving a massage to a patron of the opposite sex in massage parlors, health salons, or physical culture studios, but permitted it in barber shops, beauty parlors, and YMCA and YWCA health clubs, made a purely arbitrary selection and, therefore, was unconstitutional as class legislation. The court summed up its reasoning as follows:

> Obviously, the city council felt that the activities which the ordinance seeks to eliminate were not then being carried on in the exempted establishments. Notwithstanding, as presently written, the ordinance prohibits the proprietors and employees of a massage parlor from doing acts which can be done with impunity under similar circumstances in a barber shop or any of the other exempted places of business. Such favoritism cannot be sustained.

Id. at 299, 160 S.E.2d at 23. Similarly, the "private club" exemption here allows smoking in enclosed areas of country clubs with impunity, while prohibiting the identical activity under similar circumstances in for-profit private clubs such as the Petitioners' establishments. Moreover here, unlike in *Cheek*, the government cannot even have the pretense that the activity to be eliminated smoking in enclosed places is not being carried on in country clubs and other nonprofit private clubs.

A statute making it unlawful to discharge into the waters of the state any deleterious or poisonous substance inimical to fish, but excepting from application of the statute corporations chartered before a stated date, was found to be unconstitutional as discriminating between corporations chartered before such date and other corporations and all natural persons, without any reasonable relation to the purposes of the law. *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948). The challenged law was objectionable as "only serving to mechanically split into two groups persons in like situation with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law." *Id.* at 668, 46 S.E.2d at 862. The

same language aptly describes the fatal flaw in the smoking legislation challenged in this case.

Cases from other jurisdictions involving equal protection or similar challenges to regulations on smoking indoors also support the challenge to the "private club" exemption in this case. In *Michelle Hug, Henstock, Inc. v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008), exemptions to a city ordinance prohibiting smoking created an arbitrary and unreasonable method of classification, and therefore, the exemptions to the ordinance were "special legislation" in violation of the special privileges and immunities clause of the State Constitution. The exemptions to the ordinance included stand-alone bars, keno establishments, horse-racing simulcasting locations, and tobacco-retail outlets, but nothing in ordinance's stated purpose would explain why employees of the exempted facilities or members of the public who wished to patronize those establishments were not entitled to breathe smoke-free air or to have their health and welfare protected. Thus, there was no substantial difference of circumstances to suggest the expediency of the diverse legislation. When the legislature confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in improper discrimination; classifications for the purpose of legislation must be real and not illusive, and they cannot be based on distinctions without a substantial difference. *Id.* at 826, 749 N.W.2d at 890.

Another case striking down a smoking ban is *Louisville/Jefferson County Metro Gov't v. Metro Louisville*, 297 S.W.3d 42 (Ky. Ct. App. 2009), the court struck down as unconstitutional an exemption in a smoking ban ordinance which exempted a specific horse racing track, Churchill Downs, from the ban.

Moreover, the Petitioners' members and guests are no less deserving of protection of their right to associate in clubs not open to the public than are the members and guests at a private country club. The exemption for "private clubs," as defined in the statute, cannot withstand scrutiny under equal protection clauses of the United States and North Carolina Constitutions.

CONCLUSION

Based upon, the above arguments and case law the court must enjoin the continued fining of the Petitioners because it is clear they will prevail on the merits of the case based on the violation of the Equal Protection Clause by discriminating among similar situated businesses being private clubs. Furthermore, the Petitioners will suffer actual and immediate substantial financial harm if this injunction is not granted. The financial effects of the mounting fines will result in damaging the businesses in incurring a daily and continuing amount of debt.

The effect of continuing fines on the Petitioners business does not fully describe the harm. The enforcement of the "smoking statutes" on the Petitioners private clubs will in effect curtail their business to the point that the businesses will lose a significant amount of income and cause the ultimate shutdown of the clubs. Almost all members who have paid membership to Petitioners private club have done so with the belief that they would be allowed to continue to smoke in these establishments. Therefore Petitioners' business membership will be substantially reduced causing significant financial harm to Petitioners businesses.

RESPECTFULLY SUBMITTED,

This the 11th of May, 2010

Owens, Nelson, Owens & Dupree, P.L.L.C.

By: _____

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CERTIFICATE OF SERVICE

This is to certify that the foregoing document has been served on the Respondent by hand-delivering, email or mailing a copy thereof to Respondent's attorney whose address is as follows:

Janis Gallagher
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Greenville, NC 27834-1696

This the 11th of May, 2010

Owens, Nelson, Owens & Dupree, P.L.L.C.

By: _____

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