STATE OF NORTH CAROLINA COUNTY OF PITT	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO.: 10 CVD 1231
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, DR. JOHN H. MORROW** Respondent.	**RESPONDENT'S MEMORANDUM OF LAW**

NOW COMES the Respondent, Pitt County Health Director, Dr. John H. Morrow, by and through his undersigned counsel.

I. PROCEDURAL HISTORY

On January 2, 2010, N.C. Gen. Stat. §130A-496, *et. seq.*, the Act to Prohibit Smoking in Certain Public Places and Places of Employment ("the Act"), went into effect as law. The Act prohibits smoking in enclosed areas of certain bars and restaurants. *See* N.C. Gen. Stat. § 130A-496. Beginning in January of 2010 and continuing to the present time, complaints have been received alleging that the Petitioners were violating the Act. Pursuant to the Act, the local health director is authorized to enforce the prohibition of smoking in certain places through the imposition of administrative penalties for third and subsequent violations of the law. *See* N.C. Gen. Stat. § 130A-499(hi).

In the instant case, the Petitioners were all issued first, second and third violation notices

for their violations of the law. In conjunction with the Third Violation Notice, the Petitioners were each advised that an ongoing administrative penalty in the amount of $200.00 per day was being imposed against them pursuant to N.C. Gen. Stat. §130A-24(h1). The Petitioners were further advised that this administrative penalty would continue at the rate of $200.00 per day until 1) the Petitioners provided notice to the Pitt County Health Department that the violation(s) had been corrected, 2) the Petitioners provided the Pitt County Health Department staff access to their bar establishments during the establishments' operating hours, and 3) the health department staff verified that the establishment was in compliance with the law. The Petitioners provided written notice of appeal of the imposition of penalties and objected that N.C. Gen. Stat. §130A-496 and N.C. Gen. Stat. §130A-492 were unconstitutional.

On April 26, 2010, the Pitt County Board of Health, in its quasi-judicial capacity, heard the Petitioners' appeal of the administrative penalties imposed by the local health director and upheld the director's imposition of penalties. The Pitt County Board of Health issued a written decision upholding the local health director's imposition of administrative penalties, which contained specific findings that the Petitioners were not exempt from the law; that they did not offer any evidence to contradict the assertions that they were violating the law; and that they did not maintain that they were complying with the law. The written decision of the Pitt County Board of Health is included in the official record of this matter.

On May 11, 2010, the Petitioners filed their Petition for Judicial Review pursuant to N.C. Gen. Stat. §130A-24 appealing the Pitt County Board of Health's Written Decision Upholding Health Director's Imposition of Administrative Penalties. The Petitioners have alleged a number of specious errors committed by the Pitt County Health Department in interpreting and enforcing the Act against them. Included in their arguments are alleged equal protection and due process

violations of the United States Constitution and the North Carolina Constitution. Because the Petitioners contend that the Pitt County Board of Health's decision was based on an error of law, *de novo* review of the record by the trial court is proper; and, in turn, an appellate court is authorized to examine the trial court's order regarding an agency decision for errors of law. *Powell v. N.C. Criminal Justice Educ. & Training Standards Comm'n,* 165 N.C. App. 848, 851, 600 S.E.2d 56, 58 (2004).

II. APPLICABLE LAW

In review of the instant case, it is important that the court take notice that the Act, made effective January 2, 2010, was enacted by the General Assembly with the following legislative 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.

N.C. Gen. Stat. § 130A-491(a).

Pursuant to the Act, the local health department is charged with enforcing the prohibition against smoking in commercial restaurants and bars as defined within the statute. N.C. Gen. Stat. § 130A-497(e). The Act includes exemptions for certain establishments, including "private clubs" as defined by the statute. N.C. Gen. Stat. § 130A-496(b)(3). Specifically, the statute defines a "private club" as

> [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.

N.C. Gen. Stat. § 130A-492(8a).

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 the required corrective measures. N.C. Gen. Stat. § 130A-22(h1)(1)-(2). Following issuance of first and second notices of violation, a local health director may impose an administrative penalty of $200.00 for third and subsequent violations of the law. N.C. Gen. Stat. § 130A-22(h1)(3).

An appeal of a local health director's imposition of administrative penalties may be made to the local board of health pursuant to N.C. Gen. Stat. § 130A-24(b) as follows:

> Appeals concerning the enforcement of rules adopted by the local board of health and concerning the imposition of administrative penalties by a local health director shall be conducted in accordance with this subsection and subsections (c) and (d) of this section. The aggrieved person shall give written notice of appeal to the local health director within 30 days of the challenged action. The notice shall contain the name and address of the aggrieved person, a description of the challenged action and a statement of the reasons why the challenged action is incorrect. Upon filing of the notice, the local health director shall, within five working days, transmit to the local board of health the notice of appeal and the papers and materials upon which the challenged action was taken.

N.C. Gen. Stat. § 130A-24(b).

The Act further provides for an appeal of the decision of a local board of health to district court pursuant to N.C. Gen. Stat. § 130A-24(d) as follows:

> 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 N.C. Gen. Stat. §150B-51.
>
> In its review, the district 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.D. 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.

N.C. Gen. Stat. § 150B-51(b) (2009).

In the district court's review of the underlying case, it may take judicial notice of adjudicative facts at any stage of the proceeding. N.C. Gen. Stat. § 8C-1, Rule 201(f) (2009). The court may also take judicial notice of matters included in prior proceedings, such as an appeals hearing before the board of health; and if requested to take notice of prior proceedings, it must do so. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

III. ARGUMENT

A. The Petitioners are operating a "bar" within the meaning of N.C. Gen. Stat. § 130A-492 and are, therefore, subject to the restrictions and penalties of the Act.

To date, the Petitioners have not denied that the conduct supporting the imposition of administrative penalties did, in fact, occur in their establishments or that such activity would constitute a violation of the Act. Further, the Petitioners do not deny that they are exempt from private club status, as that term is defined under the Act. To the contrary, the Petitioners acknowledge that their business does not fit the definition of "private club" under the Act but rather assert that they are deemed a "private club" pursuant to the ABC Laws contained in N.C. Gen. Stat. §18B-1000(5).

The Act defines a "private club" as

> [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).

N.C. Gen. Stat. § 130A-492(8a).

A "private club," 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)." *Id.* The Petitioners, by their own admissions, do not meet this criterion. Additionally, the Petitioners do not claim to meet any of the other exemptions provided in the statute. Moreover, the Petitioners admit that they are a "bar," as that term is defined in the Act. *See* N.C. Gen. Stat. § 130A-492(1). Thus, the Petitioners are commercial bars subject to the restrictions and penalties of the Act.

B. The classification of private clubs contained in the Act is rationally related to a legitimate governmental interest, and, thus, does not violate the Petitioners' equal protection rights guaranteed under either the United States Constitution or the North Carolina Constitution.

"The principle of equal protection of the law is explicit in both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina." *Richardson v. North Carolina Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505. Thus, "[o]ur courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis." *Id.* Generally, courts use a two tier system of analysis in reviewing equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). The upper tier of equal protection analysis occurs where the classification impacted by the statute affects a protected class. *Id.* Where a protected class is affected, the Court must use a "strict scrutiny" standard requiring the government to 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 Cty.*, 87 N.C. App. 532, 539, 362 S.E.2d. 161, 166 (1987). The Petitioners have not asserted that they are members of a protected class, nor do they assert that their clientele— i.e. patrons who wish to

smoke while using his establishment—constitute a protected class. Therefore, a strict scrutiny standard is inapplicable in determining protection that should be afforded to the Petitioners.

In that the Petitioners have not, and cannot, assert membership in a suspect or protected class, the second tier of equal protection analysis applies. Under this analysis, "it is necessary to show only that the classification created by the statute bears a rational relationship to some legitimate state interest." *See Richardson*, 345 N.C. at 134, 478 S.E.2d at 505; s*ee also, Coalition for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d. 1251, 1258 (D. Colo. 2006) (finding a Colorado statute banning smoking in bars and restaurants constitutional); *see also Fagan v. Axelrod*, 550 N.Y.S.2d. 552 (N.Y. Sup. Ct. 1990) (finding a N.Y. law banning smoking in bars and restaurants constitutional). The legitimate state interest need not be one relied on by the General Assembly; all that is required is that the classification bears "some rational relationship to a *conceivable* legitimate interest of government." *Richardson, 345 N.C.* at 135, 478 S.E.2d at 506 (internal quotation marks omitted) (emphasis added); *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d. 1, 15 (2004) ("Rational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.")

An evaluation of a law under this rational relationship standard begins with a presumption that the classification is valid. *White v. Pate*, 308 N.C. 759, 767, 304 S.E.2d 199, 204 (1983); S*ee also Hodel v. Indiana*, 452 U.S. 314, 323, 69 L.Ed.2d 40 (1981) (stating that legislative acts carry with them a presumption of constitutionality). Thus, the opponent to the law bears the burden of showing that no rational basis exists for the classification at issue. *FCC*

v. Beach Communication, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S.Ct. 2096 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it . . . ." (internal quotation marks omitted)); *see also Mosgrove v. Town of Federal Heights*, 543 P.2d. 715, 717 (1975) (finding that challengers to a state law must "bear the burden of proving it unconstitutional beyond a reasonable doubt").

Therefore, the question before this Court is whether or not the Act and, in particular, its definitions of exempt parties, bears some rational relationship to a conceivable legitimate interest of government. A careful analysis of the Act demonstrates that the Petitioners have not, and cannot, overcome this presumption. The General Assembly had a reasonable basis for drawing a distinction between not-for-profit private clubs and for profit private clubs in setting forth the exceptions in the Act. The state has a legitimate interest in "protect[ing] the health of individuals in public places and *places of employment* and riding in State government vehicles from the risks of secondhand smoke." N.C. Gen. Stat. § 130A-491(b) (emphasis added). For profit private clubs generally conduct business through the services of employees. However, private clubs that are "incorporated as . . . nonprofit corporation[s] in accordance with Chapter 55A of the General Statutes or [are] exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1)," such as Moose Lodges, Elks Lodges, and VFW Posts, generally rely on the volunteer services of their members and do not have employees. Thus, the General Assembly could have reasonably believed that requiring not-for-profit private clubs to comply with the Act would not serve its goal to protect employees from the harmful effects of secondhand smoke. Even though the Petitioners may argue that there may be some not-for-profit private clubs that have employees, this does not in and of itself render the Act unconstitutional; all that is required is a minimum level of rationality between the classification and the goals of the General

Assembly in enacting the law. *Richardson*, 345 N.C. at 135, 478 S.E.2d at 505.

The Petitioners, however, argue that there is no rational basis in exempting not-for-profit private clubs from the Act while including for profit private clubs. In making this argument, they rely heavily on the definition of private club contained in the ABC laws. They suggest that they meet the requirements of a "private club" under the ABC laws and thus should also be considered a "private club" under the Act. Because the Act makes a distinction that the ABC laws do not, they contend their equal protection rights have been violated. This argument, however, is without merit.

The Petitioners' reliance on the definition of private club contained in the ABC laws only serves to confuse the issue at hand. In the ABC laws, the General Assembly defined "private club" as "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. Gen. Stat. § 18B-1000(5) (2009). Once classified as a private club, an establishment must comply with specific requirements in order to maintain its private club status. *See* N.C. Admin. Code tit. 4, r. 2S.0107; *see also* N.C. Admin. Code tit. 4, r. 2S .0518.

As the Petitioners correctly point out, this definition of private club encompasses both for profit private clubs and not-for-profit private clubs. However, this classification must not be blindly compared to the definition of private club in the Act but must be viewed in the context of the ABC laws as a whole with a constant awareness of the underlying purpose and intent of the ABC laws. *See Richardson*, 345 N.C. at 134, 478 S.E.2d at 505 (stating that the state may create classifications within a law as long as the "classification created by the statute bears a rational relationship to some legitimate state interest"). In examining the definitions contained in the

ABC laws, it is revealed that "private club" is distinguished from an "eating establishment," which is "[a]n establishment engaged in the business of regularly and customarily selling food, primarily to be eaten on the premises," N.C. Gen. Stat. § 18B-1000(2); a "hotel," which is "[a]n establishment substantially engaged in the business of furnishing lodging," N.C. Gen. Stat. § 18B-1000(4); and a "restaurant" which is "[a]n establishment substantially engaged in the business of preparing and serving meals" and which has "not less than thirty percent (30%) of the total gross receipts from food [and] nonalcoholic beverages." N.C. Gen. Stat. § 18B-1000(6). These classifications, in turn, shape the way ABC permits are given. In order to obtain either a malt beverage permit, a unfortified wine permit, a fortified wine permit, a brown-bagging permit, a special occasion permit, or a mix beverage permit under the ABC laws, an establishment, like the Petitioners', must either qualify as a restaurant, an eating establishment, or a private club. N.C. Gen. Stat. §§ 18B-1001(1)-(8), (10) (2009). Thus, under the statutory definitions of these terms, the only way for an establishment to legally serve alcoholic beverages while not serving any food would be to become a private club. With this in mind, it was reasonable for the General Assembly to formulate a broad definition of private club when creating this classification in the ABC laws. If the definition of private club were any narrower, a significant amount of business would be precluded from serving alcohol. Moreover, it was reasonable for the General Assembly to conclude that a broad definition of private club coupled with specific establishment and reporting requirements would serve its legitimate purpose of "establish[ing] a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina." N.C. Gen. Stat. §18B-100 (2009).

The purpose of the Act is clearly distinct from that of the ABC laws. As stated above, the purpose of the Act is rationally served by exempting only not-for-profit private clubs. To define

"private clubs" any more broadly would serve only to contravene the purpose of the Act. If the General Assembly was to adopt the ABC definition of private club in the Act, all establishments that simply required memberships would be exempt.[1] This would subject employees of every free standing bar to the harmful effects of secondhand smoke. This clearly was not the intent of the General Assembly. Thus, bringing the ABC definition of "private club" into the present discussion is misleading. All that is necessary for the court to decide is if the General Assembly, in making the private club classification in the Act, was guided by a reason that rationally related to its purpose in enacting this legislation. As stated above, a rational basis for this distinction clearly exists. Thus, the Petitioners' equal protection rights have not been violated.

C. The Act does not violate the Petitioners' substantive or procedural due process rights because smoking is not a protected fundamental right and because the Petitioners were afforded a fair and open process to assert their rights and challenge enforcement of the law against them.

The Petitioners have not detailed specific arguments as to how the North Carolina General Assembly, the Pitt County Health Director or the Pitt County Board of Health may have violated their substantive or procedural rights to due process. Likewise, they have alleged violations of the Confrontation Clause but failed to plead with specificity any arguments related to this matter of procedural due process. In their Petition for Judicial Review, the Petitioners merely restate the language contained in N.C. Gen. Stat. §150B-51 without lending any support for the contentions made therein. Absent any support for the allegations contained in the Petitioners' request for review, the Petitioners fail to meet their burden of demonstrating that enforcement of the Act has violated their substantive or procedural due process rights. Moreover, there is no basis for the Petitioners' assertion that their due process rights have been

[1] The General Assembly did consider a proposed amendment to the Act that would have adopted the ABC laws' definition of private club. However, this amendment was intentionally voted down. Senator Berger, Amendment 3 to House Bill 2, May 11, 2009, http://www.ncleg.net/Sessions/2009/BillDocuments/House/PDF/H2v7-A3.pdf.

violated.

Substantive due process protects against governmental interference with liberty interests, also referred to as fundamental rights. Neither the United States Constitution nor the North Carolina Constitution confer a constitutionally protected "right to smoke" that would limit the federal, state or local government from regulating smoking. Because the "right to smoke" is not a fundamental right, any law prohibiting this activity need only be rationally related to a legitimate government interest. The Connecticut Supreme Court in *Batte-Holmgren v. Commissioner of Public Health*, 914 A.2d 996 (Conn. 2007), clarified this point by explaining that "[r]ational basis review is satisfied so long as there is a plausible policy reason for the classification . . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature." *Batte-Homgren*, 914 A.2d at (internal quotation marks omitted). To succeed, the party challenging the legislation must "negative every conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, (1993). The legitimate government interest advanced by the Act is that of protecting the public health from the harms associated with ingesting second hand smoke. *See* N.C. Gen. Stat. § 130A-491(b). The Petitioners' burden in establishing the unconstitutionality of the Act is a heavy burden which requires them to negate any and every imaginable basis supporting the Act. The Petitioners, in putting forward theoretical arguments with no facts supporting them, have failed to meet this burden. Moreover, the Act, in prohibiting smoking in resturants and bars, is rationally related to the government's interest in protecting the public from the harmful effects of second hand smoke.

"An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for a hearing." *Cleveland Bd. Of Educ. v. Loudermill*, 470

U.S. 532, 542 (1985). However, "[n]o process is due a person who is deprived of an interest by official action unless that interest is protected by law, *i.e.*, unless it is an interest in life, liberty, or property." *State v. Stines*, 683 S.E.2d 411, 413 (N.C. App. Oct. 06, 2009) (NO. COA08-1418) (alterations in original) (internal quotation marks omitted). Here, the Petitioners are clearly due some sort of process, as their property rights—i.e. their money—is threatened by the administrative penalties. However, as it relates to the Petitioners' procedural due process arguments, the distinction must be made that necessary procedural safeguards are not intended to protect individuals from a deprivation itself, but rather to ensure that the government utilizes a fair and open process in enacting and enforcing the laws. As it relates to enforcement of the Act against the Petitioners, the process in doing so was both fair and reasonable.

Prior to the institution of the Act, the Petitioners were made aware of the pending legislation and the implications of the Act for their businesses. The Petitioners were afforded an opportunity to participate in the state's legislative process and to provide their input to representatives prior to the enactment of the law. At the same time, the Pitt County Health Department, through its Public Health Educators, offered training, educational materials, literature, appropriate signage and walk-through visits to all establishments subject to the law. In response to the educational efforts made by the Respondent, the Petitioners voiced their disagreement with the law, rejected the educational information offered to them, and have resisted compliance with the local health department since the Act's inception.

The factors to be evaluated in determining whether procedures are sufficient to ensure fundamental fairness under Fourteenth Amendment due process include 1) prior interests that will be affected by official action; 2) risk of erroneous deprivation of interests through procedures used and probable value, if any, of additional or substitute procedural safeguard; and

3) the government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Wake Cty. ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

In this case, the balancing of the Petitioners' prior interests in enjoying the right to smoke in the enclosed areas of their commercial bars is outweighed by the government's interest in regulating smoking and other matters of public health. The Petitioners' prior interests of allowing patrons to smoke were not eliminated through the adoption of the Act; instead smoking was no longer permitted in enclosed areas. The Petitioners remain free to direct their patrons to smoke in unenclosed, outdoor and patio areas.

The Petitioners have failed to articulate any erroneous deprivation of rights as a result of the enactment or enforcement of the Act. In fact, the Petitioners were afforded a full and fair process prior to the imposition of administrative penalties. Before an administrative penalty is imposed by the Respondent, complaints must first be received into a state-wide complaint system. Following the receipt of a complaint, a representative of the Pitt County Health Department makes an on-site visit (announced or unannounced) to verify compliance with the law. When noncompliance is first verified, the owner or manager of the establishment is issued a First Notice of Violation detailing the violations noted and the necessary requirements to comply with the law. A similar letter is issued following a second violation. A third violation notice is issued upon health department staff's third verification of noncompliance with the law. This notice explains that an ongoing administrative penalty of $200.00 per day has been imposed against the owner or manager of the bar, again notes the violations observed, and advises how the establishment can come into compliance and avoid the imposition of further penalties under the law. No additional procedural safeguards were necessary to advise the Petitioners of the

requirements of the law or how they could comply with the law. Here, the Petitioners elected simply to ignore the law and operate their commercial bars in violation because of their disagreement with the Act.

Finally, the court must consider the government's interest in protecting the public health against the harmful effects of secondhand smoke and the related fiscal and administrative burdens that additional or substitute procedural requirements would entail. The Act does not require a local health director to observe each and every distinct violation in order to impose an administrative penalty pursuant to N.C. Gen. Stat. 130A-22(h1). In fact, such an amendment to the Act was proposed but failed for lack of support.[2] To require this of local health directors would be impractical at best and would contravene the deterrent impact of the imposition of meaningful administrative penalties at worst. The procedure involved in enforcing the Act was contemplated and has been carried out in such a manner that adequately protects the government's interest while preserving a balanced distribution of the Petitioners' obligations in complying with the law. As such, the local health director's imposition of administrative penalties was reasonable in light of the overwhelming number of complaints received by the state system, the local health department's repeated independent verifications of noncompliance with the Act, and the Petitioners' failure to allege or demonstrate that they were ever operating in compliance with the law.

D. The Petitioners have no right to "cross examine their accusers" pursuant to the Confrontation Clause.

The Petitioners have alleged that the decision of the Pitt County Board of Health is unsupported based on proposed violation of the confrontation clause, yet this argument is

[2] The General Assembly also considered a proposed amendment to the Act that would have required a local health director's direct observation of a violation. This proposed amendment was also voted down. Representative Moore, Amendment 6 to House Bill 2, April 2, 2009.
http://www.ncleg.net/Sessions/2009/BillDocuments/House/PDF/H2v3-A6.pdf

inapplicable to the issue of imposing administrative penalties.

The 6th Amendment of the United States Constitution reads in substantial part that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation clause, which applies only to criminal due process of law, protects the right of cross-examination guaranteed to persons accused of a crime. This constitutional provision only applies when a prosecutor offers hearsay evidence against a defendant in a criminal case. Because the confrontation clause does not apply in this administrative context, Petitioners have incorrectly asserted that the Pitt County Board of Health's decision was made upon unlawful procedure.

IV. CONCLUSION

According to the Americans for Nonsmokers' Rights, *Overview List – How Many Smokefree Laws?* (http://www.no-smoke.org/pdf/mediaordlist.pdf), as of April 2009, 16,519 municipalities across the United States have passed a state or local law with a 100 percent smoke-free provision covering workplaces, and/or restaurants, and/or bars, and protecting 70.2 percent of the United States population. The Act promulgated by the North Carolina General Assembly contemplates the same strategy employed nationwide by jurisdictions seeking to protect nonsmokers from exposure to secondhand smoke.

In summary, the Petitioners have failed to prove that they are not subject to the Act, that the Act is unconstitutional or that the Pitt County Health Director and the Pitt County Board of Health acted unconstitutionally in applying the Act to them. The Petitioners are entitled to disagree with the law, however, the Act is presumed constitutional and this Court is required to indulge all reasonable presumptions in favor of the validity of an act of the legislature. *Coble et al. v. Bd. of Com'rs of Guilford Cty.*, 184 N.C. 342, 114 S.E. 487, 489 (1922). Thus, in

considering the contentions of the Petitioners, the court should give deference to any conceivable interest that would support the constitutionality of the law. *See Smith v. Keator*, 285 N.C. 530, 535, 206 S.E.2d 203, 206 (1974) (stating that when a "statute or ordinance is susceptible to two interpretations, one constitutional and one unconstitutional, court should adopt interpretation resulting in finding of constitutionality").

In response to a challenged legislative classification, the reviewing court is only required to locate some reasonable basis for the classification made. *Omernik v. State*, 64 Wis. 2d 6, 18-19, 218 N.W.2d 734, 741-42 (1974) (footnotes omitted and emphasis added). In searching for that reasonable basis, absolute equality and complete conformity of legislative classifications are not constitutionally required. *WKBH Television, Inc. v. DOR*, 75 Wis. 2d 557, 566, 250 N.W.2d 290, 294 (1977). In this instance, the rational basis test is satisfied by the merely conceivable legitimate government interests outlined in the findings and intent of the Act and also because other conceivably legitimate interpretations of the Act are plausible. As such, the Petitioners have failed to meet their burden of negating that any interest of government may be served by the classifications distinguished in this law.

Based upon the foregoing, the Respondent respectfully requests that this Court affirm the decision of the Pitt County Board of Health in upholding the Pitt County Health Director's imposition of administrative penalties issued against the Petitioners.

This the 19th day of August, 2010.

PITT COUNTY LEGAL DEPARTMENT

By: _____

Lisa Woodard Overton, Assistant County Attorney
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Greenville, NC 27834
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **RESPONDENT'S MEMORANDUM OF LAW** upon the Petitioners by depositing a copy hereof via first class postage prepaid, in the United States mail, properly addressed to:

Jonathan V. Bridgers
Owens, Nelson, Owens & Dupree, P.L.L.C.
Post Office Box 36
Greenville, NC 27835

This the 19th day of August, 2010.

PITT COUNTY LEGAL DEPARTMENT

BY: _____
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