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FILE NO.: 10CVD1231

FILM NO.:

NORTH CAROLINA MAY 11 PM 4:26  
PITT COUNTYIN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION

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

AMENDED

PETITION FOR JUDICIAL REVIEW  
 N.C. GEN. STAT §130A-24 et. seq.

Petitioners, )

MOTION FOR INJUNCTION

N.C. CIV. PRO. RULE 65

v. )

TEMPORARY RESTRAINING ORDER  
 AND/OR PRELIMINARY INJUNCTION

PITT COUNTY HEALTH )  
 DIRECTOR )

Respondent. )

Pursuant to N. C. Gen. Stat. §130A-24 et. seq., Petitioners Benjamin Edwards and Lynn Owens, owners of "Live" and George Beaman, owner of "Club 519", "5<sup>th</sup> Street Distillery" and "Mac Billiards" (hereinafter "Petitioners") petitions this Honorable Court for review of the final agency decision of Respondent Pitt County Health Director (hereinafter "Respondent"). Petitioner alleges and says the following:

**PETITION FOR JUDICIAL REVIEW**  
**N.C. GEN. STAT §130A-24 et. seq.**

1. Petitioners, Benjamin Edwards, Lynn Owens and George Beaman, are citizens and residents of Pitt County, North Carolina and have complied with all necessary prerequisites for the bringing of this petition.
2. Petitioners, "Live", "Club 519", "5<sup>th</sup> Street Distillery" and "Mac Billiards", are North Carolina Corporations and their primary place of business is Pitt County, North Carolina and these clubs are **recognized as a private club under N.C. Gen. Stat. §18B-1000(5)** defining a **"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..." have complied with all necessary prerequisites for the bringing of this petition.
3. On March 9<sup>th</sup> 2010 through April 8<sup>th</sup> 2010, Petitioner George Beaman, owner of "Club 519" and "5<sup>th</sup> Street Distillery" received their third and subsequent violations of N. C. Gen. Stat. §130A-496 Smoking Prohibited in Restaurants and Bars and N. C. Gen. Stat. §130A-497

Implementation and Enforcement, and received an administrative penalty of \$200.00 (two-hundred) dollars per day as prescribed under N. C. Gen. Stat. §130A-22(h1) Administrative Penalties.

4. On March 10<sup>th</sup> 2010 through April 8<sup>th</sup> 2010, Petitioners Benjamin Edwards and Lynn Owens, owners of "Live" received their third and subsequent violations of N. C. Gen. Stat. §130A-496 and N. C. Gen. Stat. §130A-497 and received an administrative penalty of \$200.00 (two-hundred) dollars per day as prescribed under N. C. Gen. Stat. §130A-22(h1).

5. On March 31<sup>st</sup> 2010 through April 8<sup>th</sup> 2010, Petitioners George Beaman, owner of "Mac Billiards" received their third and subsequent violations of N. C. Gen. Stat. §130A-496 and N. C. Gen. Stat. §130A-497 and received an administrative penalty of \$200.00 (two-hundred) dollars per day as prescribed under N. C. Gen. Stat. §130A-22(h1).

6. Petitioners timely filed an appeal with the Pitt County Health Director and the Pitt County Board of Health. The appeal was in reference to and in objection to the administrative penalties assessed against the Petitioners by said agency.

7. A hearing before the Pitt County Board of Health was held on April 26, 2010.

8. After the hearing on April 26, 2010 the Pitt County Health Board ruled unanimously to up hold the fines and to continue to fine the Petitioners until the Petitioners informed the Pitt County Board of Health and specifically the Pitt County Health Director that the Petitioners are in compliance with N. C. Gen. Stat. §130A-496, N. C. Gen. Stat. §130A-497 and N. C. Gen. Stat. §130A-22(h1).

9. On May 3, 2010, Respondent issued a final agency decision, upholding the Health Director's imposition of Administrative Penalties against the Petitioners.

10. Petitioners Benjamin Edwards and Lynn Owens, owners of Live and George Beaman, owner of Club 519, 5<sup>th</sup> Street Distillery and Mac Billiards hereby appeal the final decision of the Pitt County Board of Health (hereinafter "Respondent"), and specifically contend that:

a. Respondent's decision is a violation of the North Carolina and United States constitutional provisions which prohibits the Respondent from depriving a citizen of a property right with without due process of law, equal protection of the law, and in violation of the confrontation clause;

b. Respondent's decision was made upon unlawful procedure in that the Petitioner was not afforded a meaningful opportunity to cross examine and confront all their accusers;

c. Respondent's decision was affected by an error of law in that Respondent has incorrectly, and contrary to the intent of the legislature, interpreted N. C. Gen. Stat. §130A-22(h1), N. C. Gen. Stat. §130A-496 and

N. C. Gen. Stat. §130A-497; N.C. Gen. Stat. §130A-492(11)

d. Respondent's decision is unsupported by substantial evidence, admissible under the confrontation clause in view of the entire record as submitted; and

e. Respondent's decision is arbitrary and capricious and otherwise not in accordance with the law.

11. Petitioners specifically take exception to the following issues and findings of fact contained within the final agency decision propounded by Respondent:

- a. Petitioners take exception to the statement of the issue propounded by Respondent in that it contains and assumes facts not reasonably stated or inferred in Respondent's investigation.
- b. Petitioner "Mac Billiards" take exception to Finding of Fact Number 2, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- c. Petitioner "Mac Billiards" take exception to Finding of Fact Number 3, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- d. Petitioner "Mac Billiards" take exception to Finding of Fact Number 4, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in

- the record into account; and
- vi. reflects a failure to consider and important aspect of the problem.

f. Petitioner "Mac Billiards" take exception to Finding of Fact Number 5, in that the

- i. no reasonable person could reach based on the whole record;
- ii. reflects a failure to examine key evidence;
- iii. reflects a failure to engage in substantial inquiry into the facts;
- iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
- v. reflects a failure to not take admissible facts and evidence not in the record into account; and
- vi. reflects a failure to consider and important aspect of the problem.

g. Petitioner "Club 519" take exception to Finding of Fact Number 2, in that the

- i. no reasonable person could reach based on the whole record;
- ii. reflects a failure to examine key evidence;
- iii. reflects a failure to engage in substantial inquiry into the facts;
- iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
- v. reflects a failure to not take admissible facts and evidence not in the record into account; and
- vi. reflects a failure to consider and important aspect of the problem.

h. Petitioner "Club 519" take exception to Finding of Fact Number 3, in that the

- i. no reasonable person could reach based on the whole record;
- ii. reflects a failure to examine key evidence;
- iii. reflects a failure to engage in substantial inquiry into the facts;
- iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
- v. reflects a failure to not take admissible facts and evidence not in the record into account; and
- vi. reflects a failure to consider and important aspect of the problem.

i. Petitioner "Club 519" take exception to Finding of Fact Number 4, in that the

- i. no reasonable person could reach based on the whole record;
- ii. reflects a failure to examine key evidence;
- iii. reflects a failure to engage in substantial inquiry into the facts;
- iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
- v. reflects a failure to not take admissible facts and evidence not in the record into account; and
- vi. reflects a failure to consider and important aspect of the problem.

- j. Petitioner "Club 519" take exception to Finding of Fact Number 5, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- k. Petitioner "Club 519" take exception to Finding of Fact Number 6, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- l. Petitioner "5<sup>th</sup> Street Distillery" take exception to Finding of Fact Number 2, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- m. Petitioner "5<sup>th</sup> Street Distillery" take exception to Finding of Fact Number 3, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.

- n. Petitioner "5<sup>th</sup> Street Distillery" take exception to Finding of Fact Number 4, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- o. Petitioner "5<sup>th</sup> Street Distillery" take exception to Finding of Fact Number 5, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- p. Petitioner "5<sup>th</sup> Street Distillery" take exception to Finding of Fact Number 6, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- q. Petitioner "Live" take exception to Finding of Fact Number 2, in that the
- i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in

- the record into account; and
      - vi. reflects a failure to consider and important aspect of the problem.
- r. Petitioner "Live" take exception to Finding of Fact Number 3, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- s. Petitioner "Live" take exception to Finding of Fact Number 4, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- t. Petitioner "Live" take exception to Finding of Fact Number 5, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.
- u. Petitioner "Live" take exception to Finding of Fact Number 6, in that the
  - i. no reasonable person could reach based on the whole record;
  - ii. reflects a failure to examine key evidence;
  - iii. reflects a failure to engage in substantial inquiry into the facts;
  - iv. reflects a failure to take into account that which detracts from the record relied upon by Respondent;
  - v. reflects a failure to not take admissible facts and evidence not in the record into account; and
  - vi. reflects a failure to consider and important aspect of the problem.

12. Petitioners also take exception to Respondent's Conclusion of Law Number 2 to the extent that it misapplies the law and to Conclusion of Law Number 2 in that it is contrary to the stated law of this Court.

13. Petitioners also take exception to Respondent's Conclusion of Law Number 3 to the extent that it misapplies the law and to Conclusion of Law Number 3 in that it is contrary to the stated law of this Court.

14. Petitioners also take exception to Respondent's Conclusion of Law Number 4 to the extent that it misapplies the law and to Conclusion of Law Number 4 in that it is contrary to the stated law of this Court.

15. Respondent's Conclusion of Law Number 3 is erroneous in that it reflects on error of statutory interpretations and ignores the greater weight of the evidence. No evidence on the record established that there were anymore than four documented accounts of an actual violation of N. C. Gen. Stat. §130A-496, N. C. Gen. Stat. §130A-497 and N. C. Gen. Stat. §130A-22(h1).

16. Respondent's Conclusion of Law Number 4 is erroneous in that it reflects on error of statutory interpretations and ignores the greater weight of the evidence. No evidence on the record established that there were anymore than four documented accounts of an actual violation of N. C. Gen. Stat. §130A-496, N. C. Gen. Stat. §130A-497 and N. C. Gen. Stat. §130A-22(h1).

17. Based upon the forgoing, Respondent erred in substantiating the allegation of abuse against Petitioners because Respondent committed errors of law, based its decision upon unlawful procedure, its decision is a violation of constitutional provisions, ignored substantial evidence on the whole record and made a decision that was arbitrary and capricious and otherwise not in accordance with the law.

**MOTION FOR INJUNCTION  
N.C. CIV. PRO. RULE 65  
TEMPORARY RESTRAINING ORDER  
AND/OR PRELIMINARY INJUNCTION**

18. The Petitioners incorporates by reference the allegations contained in the preceding paragraphs 1. through 17. as if fully set forth herein.

19. The Petitioners are likely to succeed on the merits of the claims set forth in the petition because the Petitioners are "private clubs" as recognized by N.C. Gen. Stat. §18B-1000(5) Regulation of Alcoholic Beverages Definitions concerning establishments and therefore should be exempt from N. C. Gen. Stat. §130A-496:

N.C. Gen. Stat. §18B-1000(5) defines a "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..."



However the Petitioners are not recognized as a private club under N.C. Gen. Stat. §130A-492(11)

N.C. Gen. Stat. §130A-492(11) 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."

In the instant case, the Petitioners clubs are engaged in the *very same activity* as a "country club, "member owned club" or "non-profit business" exempted by N.C. Gen. Stat. §130A-492(11) allows the patrons of the exempted private clubs to smoking indoors in there facilities which serve food and/or alcohol. However Petitioners similar situated patrons are banned from smoking indoors in the establishments which serve food and/or alcohol.

Although North Carolina Courts have long held that "the General Assembly undoubtedly has authority to provide for the creation of classes and to classify objects of legislation. The classifications are upheld if they are practical and prescribe regulations of different classes. The one requirement is that the ordinance creating a classification must affect all persons similarly situated or engaged in the same business without discrimination." *Hursey v. Town of Gibsonville*, 284 N.C. 522, 528 (1974) (citing *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864; *State v. McGee*, 237 N.C. 633, 75 S.E.2d 783). In the present matter before the Court the Statute's classification singles out and unlawfully discriminates against Petitioners business without any practical rational or justification.

20. 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.

The Petitioners will be forced to continue to appeal said continued fines every 30 days and then file another petition for judicial review until the matter is finally adjudicated. This also puts duplicitous appeals and petitions in front of the same body and judicial system.

21. The Respondent will suffer no harm from the injunction since these are fines and not

general fund revenue.

WHEREFORE, the Petitioners pray the Court:

1. That the final agency decision of Respondent be reversed and that no finding of violation of N. C. Gen. Stat. §130A-496 and N. C. Gen. Stat. §130A-497 by Petitioners.
2. That the cost of this appeal, including attorneys' fee, be taxed to Respondent, if by law allowed;
3. That the Court grant such relief *ex parte* if the Court determines that Respondent Pitt County Board of Health has not received notice of these proceedings and this motion at the time the matter comes on for hearing;
4. Accept a nominal amount such as one dollar as security for any injunction the Court may enter;
5. Set this matter for further hearing on motion for entry of preliminary injunction, if necessary;
3. For such other legal and equitable relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,

This the 11<sup>th</sup> of May, 2010

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

By: 

Jonathan V. Bridgers  
Attorney for Petitioners  
P. O. Box 36  
Greenville, NC 27835  
(252) 757-3300  
State Bar #: 34756

CERTIFICATE OF SERVICE

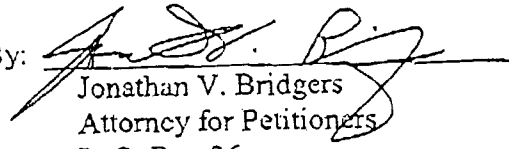
This is to certify that the foregoing document has been served on the Respondent by hand-delivering or mailing a copy thereof to Respondent's attorney whose address is as follows:

Janis Gallagher  
County Attorney  
Pitt County Board of Health  
Legal Department  
Pitt County Office Building  
1717 W. 5<sup>th</sup> Street  
Greenville, NC 27834-1696

This the 11<sup>th</sup> of May, 2010

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

By:

  
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