IN THE SUPREME COURT OF THE STATE OF ALASKA

Fraternal Order of Eagles, Juneau-Douglas Aerie 4200, Mark Page, Brian Turner, R.D. Truax and Larry Paul,

Appellants,

v.

City and Borough of Juneau,

Appellee.

Supreme Court No. S-13748

Superior Court Case No. 1JU-08-00730 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
THE HONORABLE PHILIP M. PALLENBERG, PRESIDING

BRIEF OF APPELLEE CITY AND BOROUGH OF JUNEAU

CITY AND BOROUGH OF JUNEAU

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Filed in the Supreme Court of the State of Alaska this ____ day of _____, 2010.

By: _____
Deputy Clerk

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UNITED STATES CONSTITUTION

Amendment I.

Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ALASKA CONSTITUTION

Article I, section 22.

Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Article X, section 1.

Purpose and Construction. The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Article X, section 11.

Home Rule Powers. A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

CITY AND BOROUGH OF JUNEAU CODE OF ORDINANCES

CBJ Chapter 36.60
SECOND-HAND SMOKE CONTROL CODE

36.60.005 Definitions.

In this chapter:

Bar means a business, other than a restaurant, licensed by the State of Alaska to sell alcoholic beverages.

Business means any sole proprietorship, partnership, joint venture, corporation, nonprofit corporation, or other business entity.

Employee means any person who is employed by any employer for compensation or profit or who works for an employer as a volunteer without compensation.

Employer means any person, partnership, corporation, including a municipal corporation, or nonprofit entity, but not including the state or federal government, who employs the services of one or more individual persons.

Enclosed area means all interior space within a building or other facility between a floor and a ceiling that is enclosed on all sides by temporary or permanent walls, windows, or doors extending from the floor to the ceiling.

Enclosed public place means an enclosed area or portion thereof to which the public is invited or into which the public is permitted, including:

(1) Retail stores, shops, banks, laundromats, garages, salons, or any other business selling goods or services;

(2) The waiting rooms and offices of businesses providing legal, medical, dental, engineering, accounting, or other professional services;

(3) Hotels, motels, boardinghouses, hostels, and bed and breakfast facilities, provided that the owner may designate by a permanently affixed sign a maximum of 25 percent of the rooms as exempt from this definition;

(4) Universities, colleges, schools, and commercial training facilities;

(5) Arcades, bingo halls, pull-tab parlors, and other places of entertainment;

(6) Health clubs, dance studios, aerobics clubs, and other exercise facilities;

(7) Hospitals, clinics, physical therapy facilities;

(8) Any facility which is primarily used for exhibiting any motion picture, stage, drama, lecture, musical recital, or similar performance;

(9) Public areas of fish hatcheries, galleries, libraries and museums;

(10) Polling places;

(11) Elevators, restrooms, lobbies, reception areas, waiting rooms, hallways and other common-use areas, including those in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;

(12) Restaurants, coffee shops, cafeterias, sandwich stands, private or public schools cafeteria, and any other eating establishment which offers food for

sale, and including any kitchen or catering facility in which food is prepared for serving off the premises;

(13) Sports and exercise facilities, including sports pavilions, gymnasia, health spas, boxing arenas, swimming pools, pool halls, billiard parlors, roller and ice rinks, bowling alleys, and similar places where members of the public assemble to engage in physical exercise, participate in athletic competition, or witness sports events;

(14) Any line in which two or more persons are waiting for or receiving goods or services of any kind, whether or not in exchange for money;

(15) Areas used for and during the course of meetings subject to the Alaska Open Meetings Act; and

(16) Bars, private clubs, and any other enclosed place, where alcoholic beverages are sold, or food is offered for sale.

Place of employment means an area or a vehicle under the control of an employer normally used by employees in the course of employment, including work areas, private offices, employee lounges, restrooms, conference rooms, classrooms, cafeterias, elevators, stairways, and hallways.

Private club means an organization, whether incorporated or not, that is the owner, lessee, or occupant of a building or portion thereof used for club purposes, which is operated for a recreational, fraternal, social, patriotic, political, benevolent, athletic, or other purpose.

Smoking means inhaling or exhaling tobacco smoke, or carrying any lighted tobacco product.

36.60.010 Smoking prohibited.

(a) Smoking is prohibited in:

(1) Enclosed public places;

(2) Enclosed areas that are places of employment;

(3) Vehicles and enclosed areas owned by the City and Borough of Juneau, including the Juneau School District;

(4) Commercial passenger vehicles regulated by the City and Borough under CBJ 20.40;

(5) Bus passenger shelters; and

(6) Private clubs that are licensed by the State of Alaska to sell alcoholic beverages, or that offer food for sale, regardless of the number of employees.

(b) Notwithstanding any other provision of this chapter, smoking and the use of smokeless tobacco products is prohibited anywhere within the area defined as the "Hospital Tobacco-free Campus."

(1) For purposes of this subsection, the "Hospital Tobacco-free Campus" means all buildings and facilities owned or leased by Bartlett Regional Hospital, whether inside or outside the buildings or facilities; the Bartlett House, the Juneau Medical Center, and Wildflower Court, whether inside or outside the buildings or facilities; the vehicle parking areas owned or leased by the hospital; the vehicle parking areas for the Bartlett House, the Juneau Medical Center, and Wildflower Court; and the public streets and public sidewalks adjacent to any of these buildings and facilities; provided, however, the five pavilion areas at Wildflower Court are excluded from the Tobacco-free Campus; all as shown on Exhibit A to Ordinance 2007-20.

(2) For purposes of this subsection, use of smokeless tobacco products means use of snuff, chewing tobacco, smokeless pouches, or other forms of loose leaf tobacco.

36.60.020 Smoking in enclosed areas that are places of employment.

(a) By the effective date of this chapter, any employer subject to this chapter shall adopt and enforce a written policy prohibiting smoking in all enclosed areas that are places of employment and all vehicles owned or operated by that employer and used by those employees.

(b) The smoking policy shall be communicated to all employees prior to its adoption.

(c) All employers shall supply a written copy of the smoking policy upon request to any current or prospective employee or to an employee of the City and Borough engaged in enforcing this chapter.

36.60.025 Reasonable distance.

Except as provided in subsection 36.60.030(7), no person may smoke within ten feet of any entrance, open window, or ventilation system intake of any building area within which smoking is prohibited by this chapter; provided, however, no person may smoke or use smokeless tobacco products anywhere within the "Hospital Tobacco-free Campus" as that area is defined in section 36.60.010(b) of this chapter.

36.60.030 Exceptions; areas where smoking is not prohibited.

(a) Smoking is not prohibited in the following places:

(1) Private residences, including those used as a place of employment, provided this exception does not apply at any time the private residence is open for use as a child care, adult care, or health care facility;

(2) Places of employment with a total of four or fewer employees, provided that this exception does not apply to a place of employment that is an enclosed public place or a private club;

(3) Private enclosed areas in nursing homes or assisted living facilities;

(4) Reserved;

(5) Performers smoking as part of a stage performance;

(6) Reserved;

(7) Outdoor patios, decks, and other outdoor areas used for seating by a bar, restaurant, or other establishment where alcoholic beverages are sold or food is offered for sale, provided that at least two sides of the area are open directly to the outdoors, and provided further that the minimum reasonable distance under section 36.60.025 shall be five feet meaning that no person in these areas may smoke within five feet of any entrance, open window, or ventilation system intake of the building area for the establishment;

(8) Federal or state property, or those portions of buildings leased by the federal or state government; and

(9) Private property used for residential incarceration under contract to a federal or state correctional agency.

(b) The owner, operator, or manager of property may by permanently affixing a sign thereon, waive any exception provided in subsection (a) of this section.

36.60.035 Posting of signs.

(a) Signs prohibiting smoking shall be prominently posted by the owner, operator, manager or other person having control on every building or other area where smoking is prohibited by this chapter.

(b) Every place where smoking is prohibited by this chapter shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited.

(c) The owner, operator, manager or other person having control of any area where smoking is prohibited by this chapter shall remove therefrom all ashtrays and other smoking paraphernalia.

36.60.040 Non-retaliation.

No person or employer shall discharge, refuse to hire, refuse to serve, or in any manner retaliate against any employee, applicant for employment, or customer because such employee, applicant, or customer exercises any right or seeks any remedy afforded by this chapter.

36.60.045 Violations.

(a) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this chapter to fail to comply with any of its provisions. Violation of this subsection is an infraction.

(b) It shall be unlawful for any person to smoke or use a smokeless tobacco product in any area where smoking or use of smokeless tobacco products is prohibited by the provisions of this chapter. Violation of this subsection is an infraction.

(c) In addition to the penalties and remedies available under this Code, the City and Borough or any person aggrieved by a violation or threatened violation of this chapter may bring a civil action to enjoin that violation.

36.60.050 Other applicable laws.

This chapter shall not be construed to permit smoking where it is otherwise restricted by other applicable laws.

ANCHORAGE MUNICIPAL CODE

AMC Chapter 16.65 SECONDHAND SMOKE CONTROL ORDINANCE

Editor's note--AO No. 2006-86(S), § 1, effective July 1, 2007, amended Chapter 16.65, in its entirety.

16.65.001 Title and purpose.

A. This chapter shall be known as "The Secondhand Smoke Control Ordinance."

B. The purposes of this chapter are to:

1. Protect the public health, safety and general welfare by eliminating exposure to secondhand smoke in public places, places of employment, and places where child care is offered.

2. Acknowledge the need of nonsmokers, especially children, to breathe smoke-free air, recognizing the danger to public health which secondhand smoke causes.

3. Recognize that the need to breathe air free of the disease-causing toxins in secondhand smoke should have priority over the desire and convenience of smoking in public places, places of employment and childcare.

4. Recognize the right and benefit to municipal residents and visitors to be free from unwelcome secondhand smoke in public places and places of employment.

16.65.005 Definitions.

In this chapter:

Business means any natural person or legal entity (such as, without limitation, a business-for-profit corporation, nonprofit corporation, partnership, limited liability company or trust) that undertakes to provide goods or services to the public or to persons who are members of a private group that is eligible to obtain the goods or services, regardless of whether the business exists or is conducted for the purpose of making a profit.

Employee means any person who is employed by any business for compensation or works for a business as a volunteer without compensation.

Enclosed area means all interior space within a building or other facility between a floor and a ceiling that is enclosed on all sides by walls, windows, or doors extending from the floor to the ceiling.

Place of employment means an area under the control of an employer, that employees may frequent during the course of employment, including, but not limited to, work areas, employee lounges, restrooms, conference rooms, classrooms, cafeterias, hallways, and vehicles.

Private club means an organization (whether a legal entity or an informal association of persons) that is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.

Public place means any enclosed area to which the public is invited or into which the public is permitted, including but not limited to, educational facilities, entertainment, food and beverage service, offices, retail stores, and transportation facilities and vehicles accessible to the general public.

Smoking means inhaling, exhaling, burning or carrying any lighted tobacco product.

16.65.010 Prohibition of smoking.

A. Smoking is prohibited at the following places:

1. All enclosed public places within the Municipality of Anchorage, including, but not limited to, all businesses visited by the public, transportation facilities, waiting areas of public transit depots, buses, taxicabs, sports arenas, and other enclosed areas open to the public.

2. All enclosed areas that are places of employment.

3. All enclosed areas on properties owned or controlled by the Municipality of Anchorage, including the Anchorage School District, and including every room, chamber, place of meeting or public assembly under the control of any municipal board, council, commission, committee, or municipal authority.

4. All areas within 20 feet of each entrance to enclosed areas on properties owned or controlled by the Municipality of Anchorage including the Anchorage School District, and including every room, chamber, place of meeting or public assembly under the control of any municipal board, council, commission, committee, or municipal authority.

5. All areas within 50 feet of each entrance to a hospital or medical clinic.

6. All enclosed areas where a person provides child care on a fee for service basis.

7. Seating areas of outdoor arenas, stadiums, and amphitheaters.

8. All areas within five feet of the entrance to a premises licensed under state law to sell alcoholic beverages for consumption on the premises. When a licensed premises includes an outdoor area such as a patio or deck, the minimum reasonable distance under subsection 16.65.020 shall be five feet.

B. Smoking is prohibited on any property not listed in subsection A of this section, with or without enclosure, if the owner, operator, manager, or other person having control of the property chooses to prohibit smoking.

16.65.020 Reasonable distance.

To ensure that smoke does not enter any enclosed area where smoking is prohibited through entrances, windows, ventilation systems or any other means, smoking shall occur only at a reasonable distance outside any enclosed public place or place of employment where smoking is prohibited. Unless otherwise stated under this chapter, or increased by the owner, operator, manager, or other person having control of the property, the minimum reasonable distance is 20 feet.

16.65.030 Exceptions; areas where smoking is not prohibited.

A. Smoking is not prohibited in the following places:

1. A maximum of 25 percent of hotel and motel sleeping rooms rented to guests designated as smoking rooms if the hotel or motel designates at least 75 percent of its guest rooms as permanently nonsmoking.

2. Private clubs that are not licensed for the sale of alcoholic beverages under state law and are not places of employment; however, if an enclosed area is being used for a purpose, event, or function to which the general public is invited, then smoking is prohibited.

3. Outdoor areas of places of employment except the outdoor areas identified under AMC 16.65.010.

4. Private residences, except enclosed areas during the time child care is provided on a fee for service basis. Individuals providing day care on a fee for service basis shall not expose children to secondhand smoke.

B. Nothing in this chapter shall be construed or interpreted to provide any person a right to smoke on premises or property owned, leased or under the legal control of another.

16.65.040 Obligations of property owners and employers.

A. "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it) shall be clearly, sufficiently, and conspicuously posted by the owner, operator, manager, or other person having control of a building or other area where smoking is prohibited by this chapter.

B. Every public building owned or controlled by the Municipality of Anchorage shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited within 20 feet of the entrance to the building and within the building.

C. Every hospital and health care facility to which this chapter applies shall have posted at every entrance a conspicuous sign clearly stating that smoking is prohibited within 50 feet of the entrance to the building and within the building.

D. All ashtrays and other smoking accessories offered for on-premises use shall be removed by the building owner, operator, manager, or other person having control of a building or other area where smoking is prohibited by this chapter.

E. It shall be the responsibility of employers to provide a smoke-free workplace, and neither an employer nor person having legal control of the premises may permit an employee, customer, or other person to smoke inside enclosed areas that are places of employment.

16.65.050 Violations and penalties.

A. It shall be unlawful for any person to smoke in any area where smoking is prohibited and for any person who owns, manages, operates, or otherwise controls the use of premises subject to this chapter to fail to comply with the provisions of this chapter.

B. A person who smokes in an area where smoking is prohibited by the provisions of this chapter shall be subject to a fine of $100.00.

C. A person, owner, manager, employer, or operator who controls an enclosed area or place of employment or child care in violation of this chapter shall be subject to the following penalties:

1. A fine not exceeding $100.00 for a first violation;
2. A fine not exceeding $200.00 for a second violation; and

3. A fine not exceeding $500.00 for each additional violation.

D. Any person aggrieved by a violation or threatened violation of this chapter may bring a civil action under AMC 1.45.010.B to enjoin the violation and to obtain the relief described in that section.

16.65.060 Public education.

A. The Department of Health and Human Services shall engage in a continuing program of education about the public health purposes, benefits and requirements of this chapter for municipal residents and visitors and to guide owners, managers, employers, and operators concerning the requirements of this chapter.

B. The continuing education program may include publication of a brochure for affected businesses and individuals explaining the provisions of this chapter, the requirement to post "No Smoking" signage, the obligation to provide a smoke-free work place, and other actions consistent with AMC 16.65.040, to property owners, managers, employers, and operators.

16.65.070 Non-retaliation and non-discrimination.

No person or employer shall discharge, refuse to hire, or in any other manner retaliate or discriminate against any employee, applicant for employment, or customer because such employee, applicant for employment or customer insists upon compliance with any requirement of this chapter.

CITY AND BOROUGH OF SITKA

CITY AND BOROUGH OF SITKA

ORDINANCE NO. 2010-09

AN ORDINANCE OF THE CITY AND BOROUGH OF SITKA AMENDING SITKA GENERAL CODE AT CHAPTER 9.20 ENTITLED "SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT" TO PROHIBIT SMOKING IN MORE PLACES OF EMPLOYMENT AND PUBLIC PLACES, INCLUDING BARS AND PRIVATE CLUBS LICENSED TO SELL ALCOHOLIC BEVERAGES OR FOOD, SET A MINIMUM REASONABLE DISTANCE OUTSIDE FOR NON-SMOKING, PROVIDE FOR ADDITIONAL VIOLATION CONSEQUENCES, AND MAKE CLARIFYING AMENDMENTS, AND CONTAINING A BALLOT MEASURE FOR THE OCTOBER 5, 2010 MUNICIPAL REGULAR ELECTION

1. **CLASSIFICATION.** Section 4 of this Ordinance is of a permanent nature and is intended to become a part of the Sitka General Code ("SGC") if approved by the majority of the voters at the October 5, 2010 municipal regular election. Sections 2, 3, and 6 are of a permanent nature, but are not intended to become part of the SGC. Section 5 is of a temporary nature and not intended to become part of the SGC.

2. **SEVERABILITY.** If any provision of this Ordinance or any application to any person or circumstance is held invalid, the remainder of this Ordinance and application to any person or circumstance shall not be affected.

3. **PURPOSE.** This Ordinance creates a ballot proposition to be placed on the next municipal regular election on October 5, 2010 that will amend SGC at Chapter 9.20 entitled "Smoking in Public Places and Places of Employment." The proposed amendments to SGC Chapter 9.20 are contained in this Ordinance at section 4.

The principal purpose of the amendments is to prohibit smoking in more places of employment and public places, including bars as well as in private clubs that are licensed by the State of Alaska to sell alcohol or food. These amendments are to ensure that more people are protected from the dangers of secondhand smoke in public places and places of employment. Also, the amendments establish 10 feet as the minimum reasonable distance from entrances, windows and ventilation systems for smoking outside public places where smoking is prohibited. Additionally, this Ordinance provides for additional violation consequences concerning any City and Borough of Sitka permit or license for the non-smoking establishment. Further, this Ordinance makes clarifying edits, including amending the definition section to add definitions for bar and private club, and to amend the definition of "employee" to include anyone "who works for an employer as a volunteer without compensation."

Many of the amendments to this Ordinance are modeled after amendments to similar provisions in the municipal codes for Anchorage and Juneau.

4. **NOW, THEREFORE, BE IT ENACTED** by the Assembly of the City and Borough of Sitka that SGC at Chapter 9.20 is amended as follows (new language underlined; deleted language stricken):

Chapter 9.20
SMOKING IN PUBLIC PLACES AND PLACES OF EMPLOYMENT

* * *

9.20.005 Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

A. "Bar" means a business, other than a restaurant or a liquor store, that is licensed by the State of Alaska to sell alcoholic beverages, that serves alcoholic beverages for consumption by guests on the premises, and in which any serving of food is only incidental to the consumption of alcoholic beverages, and includes taverns, nightclubs, and cocktail lounges.

BA. "Business" means a sole proprietorship, partnership, joint venture, corporation, or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold as well as professional corporations and other entities where legal, medical, dental, engineering, architectural, or other professional services are delivered.

CB. "Employee" means a person who is employed by an employer for compensation or profit ~~in consideration for direct or indirect monetary wages or profit~~, or who works for an employer as a volunteer without compensation or profit.

DC. "Employer" means a person, business, partnership, association, corporation, including a municipal corporation, trust, or nonprofit entity, that employs the services of one or more individual persons.

ED. "Enclosed area" means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows (exclusive of doorways), which extend from the floor to the ceiling.

FE. "Health care facility" means an office or institution providing care or treatment of diseases, whether physical, mental, or emotional, or other medical, physiological, or psychological conditions, including~~, but not limited to,~~ hospitals, rehabilitation hospitals or other clinics, including weight control clinics, nursing homes, homes for the aging or chronically ill, laboratories, and offices of surgeons, chiropractors, physical therapists, physicians, dentists, and all specialists within these professions. This definition shall include all waiting rooms, hallways, private rooms, semiprivate rooms, and wards within health care facilities.

GF. "Place of employment" means an area under the control of a public or private employer that employees normally frequent during the course of employment, including~~, but not limited to,~~ work areas, employee lounges, private clubs, bars, restrooms, conference rooms, meeting rooms, classrooms, employee cafeterias, hallways, and vehicles. A private residence is not a "place of employment" unless it is used as a child care, adult day care, or health care facility.

HG. "Private club" means an organization, whether incorporated or not, or whether a legal entity or an informal association of persons, that either owns, leases, or is an occupant of a building or portion of a building for which it has been issued a license by the State of Alaska to sell alcoholic beverages or to sell food.

IH. "Public place" means an enclosed area to which the public is invited or in which the public is permitted, including~~, but not limited to,~~ banks, educational facilities, health care facilities, private clubs, bars, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports arenas, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.

JI. "Restaurant" means an eating establishment, including~~, but not limited to,~~ coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, which gives or offers for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere.

KJ. "Retail tobacco store" means a retail store utilized primarily for the sale of tobacco products and accessories and in which the sale of other products is merely incidental.

LK. "Service line" means an indoor line in which one or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money.

ML. "Shopping mall" means an enclosed public walkway or hall area that serves to connect retail or professional establishments.

NM. "Smoking" means inhaling, exhaling, burning, or carrying any lighted tobacco product in any form, with the exemption of religious ceremonies.

ON. "Sports arena" means sports pavilions, stadiums, gymnasiums, health spas, boxing arenas, swimming pools, roller and ice rinks, bowling alleys, and other similar enclosed places where members of the general public assemble to engage in physical exercise, participate in athletic competition, or witness sports or other events.

* * *

9.20.015 Prohibition of smoking in public places.

Smoking shall be prohibited in all enclosed public places within the city and borough of Sitka including~~, but not limited to,~~ the following places:

A. Aquariums, fish hatcheries, galleries, libraries, and museums;~~.~~

B. Areas available to and customarily used by the general public in businesses and nonprofit entities patronized by the public, including~~, but not limited to,~~ professional offices, banks, laundromats, hotels, and motels;~~.~~

C. Areas and/or buildings that host youth agencies;~~.~~

D. Bars;

E~~D~~. Bingo facilities;~~.~~

F~~E~~. Convention facilities;~~.~~

G~~F~~. Elevators;~~.~~

H~~G~~. Facilities primarily used for exhibiting a motion picture, stage, drama, lecture, musical recital, or other similar performance;~~.~~

I~~H~~. Health care facilities;~~.~~

J~~I~~. Licensed child care and adult day care facilities;~~.~~

K~~J~~. Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple-unit residential facilities;~~.~~

L~~K~~. Polling places;~~.~~

M. Private clubs;

N~~L~~. Public transportation facilities, including buses and taxicabs, under the authority of the city and borough of Sitka and ticket, boarding, and waiting areas of public transit depots;~~.~~

O~~M~~. Restaurants;~~.~~

P~~N~~. Restrooms, lobbies, reception areas, hallways, and other common-use areas;~~.~~

QO. Retail stores;

RP. Rooms, chambers, places of meeting or public assembly, including school buildings, under the control of an agency, board, commission, committee or council of the city and borough of Sitka or a political subdivision of the state when a public meeting is in progress, to the extent the place is subject to the jurisdiction of the city and borough of Sitka;

SQ. Service lines;

TR. Shopping malls;

US. Sports arenas, including enclosed places in outdoor arenas; and

VT. Vessels inspected by the U.S. Coast Guard which are day boats with no overnight accommodations and are larger in capacity than a "six-pack" but have a capacity of less than one hundred fifty passengers.

* * *

9.20.025 Reasonable distance.

Smoking shall be prohibited near entrances, windows and ventilation systems of all work sites of public places where smoking is prohibited by this chapterregulation. The ~~Any individual who owns, manages, operates or otherwise controls the use of any premises subject to jurisdiction under this regulation shall establish a no smoking area which extends a reasonable distance from any entrance, windows and ventilation systems to any enclosed area where smoking is prohibited; such~~ reasonable distance shall be a distance sufficient to ensure that persons entering or leaving the building or facility shall not be subjected to breathing tobacco smoke and to ensure that tobacco smoke does not enter the building or facility through entrances, windows, ventilation systems or any other means. All smoking trash receptacles shall be placed outside the no smoking area in order to discourage smoking within the established boundaries. The minimum reasonable distance is ten (10) feet. Any individual, who owns, manages, operates or otherwise controls the use of any premises subject to jurisdiction under this chapter can designate a non-smoking area on the premises which extends further than the minimum reasonable distance requirement.

9.20.030 Where smoking is not regulated.

Notwithstanding any other provision of this chapter to the contrary, the following areas shall be exempt from the provisions of Sections 9.20.015 and 9.20.020:

* * *

~~G. Any bar, defined as an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, as long as such bar is in a "stand-alone building" and the bar shares no common entries, exits, or internal doors with any public places subject to Sections 9.20.015 and 9.20.020.~~

~~H. Private clubs, including but not limited to the Elks, Moose, and American Legion, as long as each such private club is in a "stand-alone building" and the private club shares no common entries, exits, or internal doors with any public places subject to Sections 9.20.015 and 9.20.020.~~

9.20.035 Declaration of establishment as nonsmoking—Prohibition of children in places of employment where smoking is permitted.

Notwithstanding any other provision of this chapter, an owner, operator, manager, or other person in control of an establishment, facility, or outdoor area may declare that entire establishment, facility, or outdoor area as a nonsmoking place. Smoking shall be prohibited in any place in which a sign conforming to the requirements of Section 9.20.040 is posted. Children under the age of eighteen shall not be permitted in any place of employment where smoking is allowed under Section 9.20.030, unless an owner, operator, manager, or other person in control of such an establishment, facility or outdoor area declares it to be non-smoking.

* * *

9.20.055 Violations and penalties.

* * *

D. In addition to the fines established by this section, violations of this chapter by a person who owns, manages, operates, or otherwise controls an establishment regulated by this chapter may result in the denial, refusal to renew, suspension, or revocation of any applicable City and Borough of Sitka permit or license for the establishment.

* * *

5. **BALLOT MEASURE.** The ballot measure shall read as follows:

CITY AND BOROUGH OF SITKA

PROPOSITION __

Shall the Sitka General Code at Chapter 9.20 entitled "Smoking in Public Places and Places of Employment" be amended to prohibit smoking in bars and in private clubs licensed to sell alcoholic beverages or food, set a minimum reasonable distance outside for non-smoking, add violation

consequences, and make clarifying amendments to further protect people from the effects of secondhand smoke?

YES ___

NO ___

Informational: See Ord. 2010-009 for the amendments.

6. **EFFECTIVE DATE.** All sections of this Ordinance except Section 4 shall be effective the day after the Assembly of the City and Borough of Sitka passes, approves, and adopts this Ordinance. Section 4 of this Ordinance shall become effective forty five (45) days after the regular election on October 5, 2010, if a majority of voters voting on this ordinance approve it.

CITY OF PETERSBURG

CITY OF PETERSBURG, ALASKA

ORDINANCE # 942

AN ORDINANCE PROHIBITING SMOKING IN ALL WORKPLACES AND PUBLIC PLACES

Section 1. Classification: This ordinance is of a permanent nature and shall be codified in the Petersburg Municipal Code.

Section 2. Purpose: The purpose of this ordinance is to protect the public health and welfare by prohibiting smoking in public places and places of employment within the City of Petersburg, Alaska; and to recognize the need to breathe smoke free air shall have priority over the desire to smoke.

Section 3. Substantive Provisions: The City of Petersburg Ordains:

1. Existing City Code Chapter 9.32, entitled Smoking, is hereby repealed

~~**9.32.010 Restricted in transient accommodations and dangerous areas.**~~
~~There shall be no smoking (A) in beds of hotels, motels, apartments or rooming houses (B) in dry cleaning plants or (C) in areas where combustible materials are stored and handled~~

and in its place the following is inserted:

Chapter 9.32 of the Petersburg Municipal Code is hereby amended to be entitled the **Smoke Free Air Act of 2010**

A. Section 19.32.010 Definitions. The following words, terms and phrases, when used in this title shall have the meanings ascribed to them except where the context clearly indicates a different meaning:

"Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages.

"Business" means a sole proprietorship, partnership, joint venture, corporation, or other business entity, either for-profit or not-for-profit, including retail establishments where goods or services are sold; professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered; and private clubs.

"Common area" means an area inside or outside of a building or facility that is available for use by all members of the public; or employees of a business; or tenants and their guests of multi-unit residential facilities.

"Employee" means a person who is employed by an employer in consideration for direct or indirect monetary wages or profit and a person who volunteers his or her services for a non-profit entity.

"Employer" means a person, business, partnership, association, corporation, including a municipal corporation, trust, or non-profit entity that employees the services of one or more individual persons.

"Enclosed Area" means all space between a floor and ceiling that is enclosed on all sides by permanent or temporary walls or windows (exclusive of doorways) which extend from the floor to the ceiling.

"Health Care Facility" means an office or institution providing care or treatment of diseases, whether physical, mental or emotional, or other medical, physiological, or psychological conditions, including but not limited to: hospitals, clinics, nursing homes, long-term care and assisted living facilities, laboratories, and the individual offices within these facilities. This definition shall include all waiting rooms, hallways, private rooms, semiprivate rooms and wards.

"Non-service area" is an area within a business where employees are not required to provide patrons with any service or goods.

"Place of Employment" means an enclosed area under the control of a public or private employer that employees normally frequent during the course of employment, excluding mobile marine vessels. A private residence is not a "place of employment" unless it is used as a child care, adult day care or health care facility.

"Playground" means any park or recreational area designed in part to be used by children that has play or sports equipment installed or that has been designated or landscaped for play or sports activities, or any similar facility located on public or private school grounds or on city grounds.

"Private Club" means an organization, whether incorporated or not, which is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, which is operated solely for a recreational, fraternal, social, patriotic, political, benevolent or athletic purpose, and which only sells alcoholic beverages incidental to its operation. The affairs and management of the organization are conducted by a board of directors, executive committee or similar body chosen by the members at an annual meeting. The organization has established bylaws and/or a constitution to govern its activities. The organization has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. Section 501.

"Public Place" means an enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, bars, educational facilities, gaming facilities, health care facilities, hotels and motels, laundromats, public transportation vehicles and facilities, taxi cabs, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail and wholesale stores, shopping and office malls, sports arenas, theaters and waiting rooms. A private residence is not a "public place" unless it is used as s child care, adult day care, or health care facility.

"Restaurant" means an eating establishment, including but not limited to coffee shops, cafeterias, sandwich stands and school cafeterias, which gives or offers for sale food to the public, guests, or employees, as well as kitchens and catering facilities in which food is prepared on the premises for serving elsewhere. The term "restaurant" shall include a bar area within the restaurant.

"Service Line" means an indoor or outdoor line in which one (1) or more persons are waiting for or receiving service of any kind, whether or not the service involves the exchange of money, including but not limited to, ATM lines, concert lines, food vendor lines, movie ticket lines and sporting event lines.

"Shopping Mall" means an enclosed public walkway or hall area that serves to connect retail or professional establishments.

"Smoking" means inhaling, exhaling, burning or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, in any manner or in any form.

"Sports Arena" means sports pavilions, stadiums, playing fields, gymnasiums, swimming pools, roller and ice rinks and other similar places where members of the general public assemble to engage in physical exercise, participate in athletic completion or witness sports or other events.

Section 9.32.020 Application of Ordinance to City-Owned Facilities. All enclosed facilities, including buildings and vehicles, owned, leased or operated by the City of Petersburg shall be subject to the provisions of this ordinance.

Section 9.32.030 Smoking Prohibited in Enclosed Public Places. Smoking shall be prohibited in all enclosed public places within the City of Petersburg including but not limited to:

A. Galleries, libraries and museums.

B. Areas available to and customarily used by the general public in businesses and non-profit entities patronized by the public, including but not limited to, banks, laundromats, professional offices and retail service establishments.

C. Bars.

D. Bingo facilities.

E. Child care and adult day care facilities.

F. Convention facilities.

G. Educational facilities, both public and private.

H. Elevators.

I. Gaming facilities.

J. Health care facilities.

K. Hotels and motels.

L. Lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes and other multiple-unit residential facilities.

M. Polling places.

N. Public transportation vehicles, including buses and taxicabs, and ticket, boarding and waiting areas of public transportation facilities, including airport facilities.

O. Restaurants.

P. Restrooms, lobbies, reception areas, hallways and other common-use areas.

Q. Retail stores.

R. Rooms, chambers, places of meeting or public assembly, including school buildings, under the control of an agency, board, commission, committee or council of the City of Petersburg, or another political subdivision of the State.

S. Service lines.

T. Shopping malls.

U. Sports arenas, including enclosed places in outdoor arenas.

V. Theaters and other facilities primarily used for exhibiting motion pictures, stage dramas, lectures, musical recitals or other similar performances.

Section 9.32.040 Smoking Prohibited in Places of Employment

A. Smoking shall be prohibited in all enclosed facilities within places of employment. This includes common work areas, auditoriums, classroom, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles and all other enclosed facilities.

B. Prohibition on smoking in the workplace shall be communicated by the employer to all existing employees by the effective date of this ordinance and to all prospective employees upon their application for employment.

Section 9.32.050 Smoking Prohibited in Private Clubs. Smoking shall be prohibited in all private clubs.

Section 9.32.060 Smoking Prohibited in Enclosed Residential Facilities. Smoking shall be prohibited in the following enclosed residential facilities:

A. All private and semi-private rooms in nursing homes, including Petersburg Medical Center Long Term Care facility and City of Petersburg Mountain View Manor Assisted Living and Elderly Housing facilities.

B. All hotel and motel rooms that are rented to guests.

C. All bed and breakfast rental units.

Section 9.32.070 Smoking Prohibited in Outdoor Areas. Smoking shall be prohibited in the following outdoor places:

A. Within 5 feet distance of outside entrances, operable windows and ventilation systems of enclosed areas where smoking is prohibited, so as to insure that tobacco smoke does not enter those areas.

B. In and within 5 feet of outdoor seating or serving areas of restaurants.

C. In all outdoor arenas, stadiums, and playing fields. Smoking shall also be prohibited in and within 5 feet of bleachers and grandstands for use by spectators at sporting and other public events.

D. In and within 5 feet of all outdoor public transportation stations or shelters.

E. In all outdoor service lines.

F. In outdoor common areas of apartment buildings, condominiums, retirement facilities, nursing homes and other multiple-unit residential facilities, except in designed smoking areas, not to exceed twenty-five percent (25%) of the total outdoor common area, which must be located at least 5 feet outside entrances, operable windows and ventilation systems of enclosed areas where smoking is prohibited.

G. In and within 5 feet of outdoor playgrounds.

H. In areas where combustible materials are stored and handled (from old Code 9.32.010)

Section 9.32.080 Where Smoking Not Regulated. Notwithstanding any other provision of this ordinance to the contrary, the following areas shall be exempt from the provisions of section 9.32.030 and 9.32.040:

A. Private residences, except when used as a childcare, adult day care or health care facility and except as provided in 9.32.060.

B. Outdoor areas of places of employment except those covered by the provision of Section 9.32.070.

C. Smoking rooms as provided in Section 9.32.095

Section 9.32.090 Declaration of Nonsmoking Establishment. An owner, operator, manager, or other person in control of an establishment, facility or outdoor area may declare the entire establishment, facility or outdoor area as a nonsmoking place. Smoking shall be prohibited in any place in which a sign conforming to the requirements of Section 9.32.100 (A) is posted.

Section 9.32.095 Conditions Under Which Smoking is Permitted. An owner, operator, manager or other person in control of a business may elect to permit smoking in a clearly posted, designated smoking room that meets all of the following requirements:

A. The smoking room is a non-service area enclosed on all sides by solid, impermeable walls or windows extending from the floor to ceiling with self-closing doors; and

B. The smoking room maintains a negative air pressure (meaning more air is exhausted from the room than is directly supplied by the heating, ventilation or air conditioning (HVAC) systems); and

C. The smoking room's smoke-contaminated air is exhausted directly to the outdoors and is not returned to the HVAC system, and

D The smoking room and any equipment contained therein are maintained and serviced when the room is not occupied by smokers, and

E. There is no need for employees, customers or vendors to pass through the smoking room to access restrooms, break areas or any other portion of the place of business which they might need to access, and the business does not require employees, customers or vendors to enter the smoking room when it is occupied by smokers.

Section 9.32.100 Posting of Signs

A. The owner, operator, manager or other person having control of any place or area where smoking is prohibited by this chapter shall post at the main entrance to the place or area a conspicuous sign clearly stating that smoking is prohibited.

B. Every vehicle that constitutes a place of employment under this ordinance shall have at least one conspicuous sign, visible from the exterior of the vehicle, clearly stating that smoking is prohibited.

C. Should the City determine that the signs required in subsections A and B above be of a specific size, design or material, the City shall provide, at the City's expense, the said signs to all owners of areas where smoking is prohibited by this ordinance.

Section 9.32.105 Receptacles

A. The City shall supply, service and maintain public receptacles for the disposal of cigarette and cigar butts and other smoking paraphernalia in the downtown commercial area described as: on Nordic Drive, from SingLee Alley north to Petersburg Fisheries Bunk House; on Harbor Way, Chief John Lott Streets and SingLee Ally; on First Street from Haugan Drive north to Dolphin Street; and on all side streets running east and west between First Street and Harbor Way.

B. The owner, operator, manager or other person having control of any building or area where smoking is prohibited by this ordinance is encouraged to provide receptacles for the disposal of cigarette and cigar butts and other smoking paraphernalia at the entrances to their property. The service and maintenance of these receptacles shall be the responsibility of the property owner, operator, manager or person having control of the property.

Section 9.32.110 Nonretaliation; Nonwaiver of Rights

A. No person or employer shall discharge, refuse to hire or in any manner retaliate against an employee, applicant for employment or customer because that employee, applicant or customer exercises any right afforded by this ordinance or reports or attempts to prosecute a violation of this ordinance. Notwithstanding Section 9.32.130, violation of this subsection shall be a misdemeanor, punishable by a fine not to exceed $1000 for each violation.

B. An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against the employer or any other party.

Section 9.32.120 Enforcement

A. This ordinance shall be enforced by the City Manager or the Manager's designee.

B. Notice of the provisions of this ordinance shall be given to all applicants for a business license in the City of Petersburg.

C. Any person who desires to register a complaint under this ordinance may initiate enforcement with the City Manager or Manager's designee.

D. The Building Department and Fire Department, or their designees shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance with this ordinance.

E. An owner, manager, operator, or employee of an establishment regulated by this ordinance shall inform persons violating this ordinance of the appropriate provisions thereof.

F. Notwithstanding any other provision of this ordinance, an employee or private citizen may bring legal action to enforce this ordinance.

G. In addition to the remedies provided by the provisions of this Section, the City Manager or Manager's designee or any person aggrieved by the failure of the owner, operator, manager, or other person in control of a public place or a place of employment to comply with the provisions of this ordinance may apply for injunctive relief to enforce those provisions in any court of competent jurisdiction.

Section 9.32.130 Violations and Penalties

A. A person who smokes in an area where smoking is prohibited by the provisions of this ordinance shall be guiltily of an infraction, punishable by a fine not exceeding fifty dollars ($50).

B. Except as otherwise provided in Section 9.32.110 (a), a person who owns, manages, operates, or otherwise controls a public place or place of employment and who fails to comply with the provision of this ordinance shall be guilty of an infraction, punishable by:

1. A fine not exceeding one hundred dollars ($100) for a first violation.

2. A fine not exceeding two hundred dollars ($200) for a second violation within one (1) year.

3. A fine not exceeding five hundred dollars ($500) for each additional violation within one (1) year.

C. Each day on which a violation of this ordinance occurs shall be considered a separate and distinct violation.

Section 9.32.140 Other Applicable Laws. This ordinance shall not be interpreted or construed to permit smoking where it is otherwise restricted by other applicable laws.

Section 9.32.150 Liberal Construction. This ordinance shall be liberally construed so as to further its purposes.

2. Section 9.12.010, entitled Litter Defined, is amended to read: Litter is "garbage, refuse, rubbish and rubble as defined in Section 14.12.010, and all other waste material, including cigarette and cigar butts and any other smoking paraphernalia which, if thrown or deposited as herein prohibited, tends to create a danger or nuisance to public health, safety and welfare.

Section 4. Referendum and Effective Date: This ordinance shall not go into effect until and unless it is first approved by a majority of the qualified voters voting on the question at the City of Petersburg municipal election to be held on October 5, 2010. The ballot proposition shall be substantially in the following form:

PROPOSITION NO. (#pending ballot prep)

PROHIBIT SMOKING IN WORKPLACES AND PUBLIC PLACES

"Shall Ordinance #942, an Ordinance Prohibiting Smoking in Workplaces and Public Places, entitled the Smoke Free Act of 2010, be adopted?"

Yes ☐

No ☐

If the voters authorize the ordinance, the provisions of the ordinance will take effect November 1, 2010.

Section 5. Severability: If any provision of this ordinance or any application to any person or circumstance is held invalid, the remainder of this ordinance and the application to other persons or circumstances shall not be affected.

STATEMENT OF THE ISSUES

The City and Borough of Juneau Second-Hand Smoke Control Code is a comprehensive ordinance (the Ordinance, codified as CBJ Chapter 36.60) that regulates smoking in certain places within the City and Borough. The Ordinance prohibits smoking in "private clubs" that are licensed by the State of Alaska to sell alcoholic beverages, or that offer food for sale. CBJ 36.60.010(a)(6). The Fraternal Order of Eagles is a "private club" as defined in CBJ 36.60.005, and is licensed by the State of Alaska to sell alcoholic beverages. Accordingly, smoking is prohibited inside the Eagles' facility.

1. Does the Ordinance's prohibition on smoking inside a private club that is licensed to sell alcoholic beverages, such as the Eagles' facility, violate the Eagles' or its members' right to freedom of association under the United States Constitution?
2. Does the Ordinance's prohibition on smoking inside a private club that is licensed to sell alcoholic beverages, such as the Eagles' facility, violate the Eagles' or its members' right to privacy under the Alaska Constitution?

STATEMENT OF THE CASE

The Fraternal Order of Eagles, Juneau-Douglas Aerie 4200, and three of its members (hereafter collectively referred to as the Eagles) brought this lawsuit challenging the constitutionality of the CBJ's Second-Hand Smoke Control Ordinance on its face and as applied to the Eagles.[1] Juneau-Douglas Aerie 4200 is a private non-profit corporation organized under the laws of the State of Alaska. [Exc. 22 at para. 4]. It is a local chapter of the international organization Fraternal Order of Eagles. [Exc. 21 at para. 2]. The Eagles holds a license to sell alcoholic beverages and is subject to Title 4 (Alcoholic Beverages) of the Alaska Statutes.[2] The Eagles has a business manager who handles day-to-day operations and is a bartender at the club, and it has four additional part-time bartenders. [Exc. 25 at para. 9]. The rituals and operations of the Eagles are controlled by a set of policies known as "the Ritual" issued by the Grand Aerie, the governing body of the Fraternal Order of Eagles. [Exc. 21 at para. 2].

The Ordinance at issue, Ordinance 2008-05(b), is the most recent in a series of smoking-regulation ordinances enacted by the CBJ Assembly starting in 2001. [Exc. 4 – 10]. As public health measures intended to address public health concerns associated

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[1] The three Eagles members cited, Gayle Bemetz, Steve Kinter, and Patrick Young, entered no contest pleas to citation numbers J525165, J525164, and J525160 on July 29, 2008.

[2] *See* Master List of All Current Licenses available at the Alcohol Beverage Control website, http://www.dps.alaska.gov/abc/docs/MasterList.xls, at line 681, indicating that the "Fraternal Order of Eagles Aerie #4200" holds license number 3313. *See also*, [R. 42 – 43; 203].

with smoking and second-hand smoke, the ordinances phased in increasingly restrictive smoking prohibitions. A summary of the ordinances follows:

1. Ordinance 2001-40(am), adopted on October 1, 2001. [Exc. 49-54]. This ordinance created a new Chapter 36.60 in the CBJ Code, entitled "Smoking in Public Places Code," aimed at reducing the health impacts of smoking and protecting nonsmokers from secondhand smoke. The Assembly's findings in the ordinance read:

> WHEREAS, in a 1992 report entitled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* the United States Environmental Protection Agency found that exposure to environmental tobacco smoke, also known as "secondhand smoke":
>
> 1. can cause lung cancer in adult nonsmokers,
>
> 2. is linked to an increased risk of heart disease among nonsmokers,
>
> 3. causes about 3,000 lung cancer deaths annually among adult nonsmokers,
>
> 4. causes coronary heart disease and death in nonsmokers,
>
> 5. accounts for as many as 62,000 deaths from coronary heart disease annually in the United States,
>
> 6. causes respiratory problems in children, such as greater number and severity of asthma attacks and lower respiratory tract infections,
>
> 7. increases children's risk for sudden infant death syndrome and middle ear infections, and
>
> 8. annually causes as many as 300,000 lower respiratory tract infections, such as pneumonia and bronchitis in children, and
>
> WHEREAS, the Assembly finds that in order to protect the public health it is necessary to control the amount of tobacco smoke in public places ....

Ordinance 2001-40(am) prohibited smoking in enclosed public places, certain places of employment, vehicles and enclosed areas owned by the CBJ, and commercial passenger vehicles regulated by the CBJ. [Exc. 51]. It provided that smoking was not prohibited in "enclosed areas used for conferences or meetings in restaurants, service clubs, hotels, or motels while the spaces are in use for private functions admission to which is determined at least three days in advance," or in "bars and bar restaurants, provided that for bars, no tobacco smoke may infiltrate into a dining room...or into any area where smoking is prohibited." [Exc. 52]. The ordinance called for review and recommendations by a task force one year after its implementation. [Exc. 53].

The Smoking Ordinance Review Task Force transmitted its report to the Assembly in March 2004. [Exc. 55-72]. The task force recommended further expansion of the ordinance to include all public facilities and businesses and bus shelters. [Exc. 72].

2. Ordinance 2004-21, adopted on June 14, 2004. [Exc. 73-74]. This ordinance extended the smoking ban to "bar restaurants" effective January 2, 2005, and to "bars" effective January 2, 2008.

3. Ordinance 2007-20, adopted on April 23, 2007. [Exc. 75-79]. Finding that the "dangers associated with smoking, secondary smoke, and the use of smokeless tobacco, are becoming increasingly evident," the Assembly extended the smoking ban to cover the campus of Bartlett Regional Hospital, the Bartlett House, the privately-owned facilities of Juneau Medical Center and Wildflower Court, and the vehicle parking areas and public

streets and sidewalks adjacent to all of these facilities. This ordinance also prohibited the use of smokeless tobacco products in these areas.

4. Ordinance 2007-44, adopted on July 9, 2007. [Exc. 80-81]. This ordinance extended the smoking prohibition to bus passenger shelters.

5. Ordinance 2008-05(b) (the Ordinance at issue in this case) adopted on March 10, 2008. [Exc. 4-9]. Among other changes, Ordinance 2008-05(b) extended the areas where smoking is prohibited to include "[p]rivate clubs that are licensed to sell alcoholic beverages, or that offer food for sale..." [Exc. 6; CBJ 36.60.010(a)(6)]. "Private club" is defined in CBJ 36.60.005. [Exc. 4-5].

This most recent expansion of the smoking ban to private clubs that are licensed to sell alcoholic beverages must be considered in light of the preceding smoking ordinances. By operation of Ordinance 2004-21, smoking was prohibited in "bars" effective January 2, 2008. [Exc. 1; 73]. That event triggered further review of CBJ Chapter 36.60 as some members of the public raised concerns about whether there was a "level playing field" among impacted businesses – that is, smoking would be prohibited in a "bar," but not in a "private club" that sells alcoholic beverages just like a bar. [Exc. 1-2]. The Assembly directed the City Attorney to prepare an ordinance that would "close the claimed gaps in the current smoking ban ordinance" so as to prohibit smoking in all places where alcoholic beverages are sold or food is offered for sale. [Exc. 10]. The Ordinance was drafted to be similar to the Municipality of Anchorage's smoking ordinance, under which

smoking is prohibited in any "private club" that is licensed to sell alcoholic beverages or that is a place of employment. AMC 16.65.010 and AMC 16.65.030(A)(2). [Exc. 2].

The Eagles filed suit against the CBJ in July 2008 challenging the constitutionality of the Ordinance to the extent it prohibits smoking in the Eagles' club. The Eagles moved for summary judgment on their freedom of association claim under the United States Constitution and their right to privacy claim under the Alaska Constitution. The CBJ filed a cross-motion for summary judgment.

On October 14, 2009, Superior Court Judge Philip M. Pallenberg issued a decision denying the Eagles' motion and granting the CBJ's cross-motion. [Exc. 28-46]. The court held that a duly enacted ordinance is presumed to be constitutional and will be construed, to the extent possible, to avoid a finding of unconstitutionality. The court held that the Ordinance did not violate the Eagles' freedom of association under the First Amendment, nor did it violate the Eagles' right to privacy under article I, section 22, of the Alaska Constitution. The court concluded that the freedom of association protects the choice of whom to associate with, not the choice of what conduct to engage in while associating, and that the Ordinance did not infringe on the members' right to associate with whomever they choose. On the privacy claim, the court found that the right infringed upon – smoking inside the Eagles' facility – is not a fundamental right under this Court's privacy jurisprudence. Therefore, the "legitimate interest" test applied, not the "strict scrutiny" test. Applying the legitimate interest test, the court held that there

was a close and substantial relationship between the Ordinance and the legitimate governmental interest in furthering the public health. [Exc. 41 – 45].

On November 20, 2009, the Eagles filed a notice with the court that they did not intend to pursue their remaining claims. [R. 27]. On December 11, 2009, Judge Pallenberg entered Final Judgment against the Eagles and in favor of the CBJ. [Exc. 47].

STANDARD OF REVIEW

This appeal raises questions of both state and federal constitutional law. This Court reviews constitutional questions de novo, applying its independent judgment and adopting the rule of law that is most persuasive in light of precedent, reason, and policy.[3]

This Court reviews the grant of summary judgment de novo and will uphold a grant of summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[4]

This Court has long recognized that the Alaska Constitution confers broad law-making powers to local governments, and that a liberal construction is to be given to the powers of local governments.[5] A duly enacted municipal ordinance "is presumed to be constitutional" and should be construed to avoid a finding of unconstitutionality to the extent possible.[6] This Court affords "great deference" to municipal action, and action taken by a local governing body is entitled to a presumption of validity.[7]

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[3] *State v. Planned Parenthood of Alaska,* 171 P.3d 577, 581 (Alaska 2007); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).
[4] *Cabana v. Kenai Peninsula Borough*, 50 P.3d 798, 801 (Alaska 2002).
[5] *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1119-20 (Alaska 1978); *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974); AK Const. art X, §§ 1, 2, and 11.
[6] 91 P.3d at 259 (footnote omitted); *Haggblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008).
[7] 50 P.3d at 804; *Norene v. Municipality of Anchorage*, 704 P.2d 199, 202 (Alaska 1985).

ARGUMENT

I. THE CITY AND BOROUGH OF JUNEAU HAS BROAD POWERS AS A HOME RULE MUNICIPALITY, AND MUNICIPAL ORDINANCES ARE PRESUMED TO BE CONSTITUTIONAL.

As a home rule municipality, the CBJ is vested by article X, section 11, of the Alaska Constitution with the power to "exercise all legislative powers not prohibited by law or by charter." Article X, section 1, provides that "[a] liberal construction shall be given to the powers of local government units." This court has held on numerous occasions that

> [a] duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional. Courts should construe enactments to avoid a finding of unconstitutionality to the extent possible.[8]

Consistent with these principles, this Court has emphasized the "great deference afforded municipal action"[9] and the presumption of validity of action taken by a local governing body:

> According to McQuillin, 'where a local legislative body has power to determine the expediency or necessity of measures relating to local government, its judgment upon the matters within the scope of its authority cannot be controlled by the courts.' As we stated in *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough,* 527 P.2d 447, 452 (Alaska 1974): It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people.[10]

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[8] 91 P.3d at 259 (footnote omitted).
[9] 50 P.3d at 804.
[10] 704 P.2d at 202 (Alaska 1985) (footnote and citation omitted).

The CBJ has a significant interest in protecting the health and welfare of its citizens. In exercising its broad powers under Alaska law, the CBJ Assembly has authority to determine, in its sound discretion, the nature and scope of local regulations on public health and welfare that will best serve the public interest. Duly enacted as a public health measure, the Ordinance regulates smoking in a wide variety of places so as to minimize the harmful affects of smoking and second-hand smoke on the citizens of Juneau. The Ordinance embodies public policy choices made by the CBJ Assembly. The Court should not interfere with this exercise of legislative power unless the Ordinance is prohibited by law or by Charter.[11]

As the superior court correctly concluded, and as discussed below, the Ordinance is not prohibited by law. Application of the Ordinance to the Eagles to prohibit smoking inside the facility – because the Eagles is a private club that is licensed to sell alcoholic beverages and therefore smoking is prohibited under CBJ 36.60.010(a)(6) – does not infringe on the Eagles' constitutional rights of association or privacy. Accordingly, the Court should defer to the policy choices made by the Assembly in enacting the Ordinance.

II. THE ORDINANCE DOES NOT VIOLATE THE EAGLES' RIGHT TO FREEDOM OF ASSOCIATION UNDER THE UNITED STATES CONSTITUTION.

A. The Ordinance does not implicate the freedom of association because it does not regulate who may associate with whom.

The Eagles argue that the Ordinance violates their right to freedom of association

[11] The Eagles did not raise any claims under the CBJ Charter.

under the First Amendment of the United States Constitution. However, the Ordinance does not regulate who may associate with whom. It does not prevent or restrict the Eagles from freely associating with whomever they wish to associate with, be it at meetings, social events, secret rituals, fundraising events, or any other function. Rather, it regulates certain conduct in certain places – it regulates where a person may smoke – by providing that smoking is prohibited inside private clubs that sell alcoholic beverages. People are free to join the Eagles or not, or to spend time at the Eagles' club or not. The only thing the Ordinance regulates is smoking inside the facility. The Ordinance does not implicate the freedom of association.

B. The courts have uniformly rejected claims that smoking ban laws infringe upon the right to freedom of association under the First Amendment.

Challenges to smoking bans on grounds that they violate the freedom of association have been rejected by courts all over the country.[12] Presumably, that is why the Eagles rely instead on cases involving whether the application of anti-discrimination laws to private clubs infringe upon the freedom of association. As the trial court noted, the cases cited by the Eagles involve regulation of the membership of private clubs, as

[12] *See, e.g., American Legion Post No. 149 v. Washington State Dep't of Health*, 192 P.3d 306 (Wash. 2008); *American Lithuanian Naturalization Club v. Board of Health of Athol*, 844 N.E.2d 231 (Mass. 2006); *The Players, Inc. v. City of New York, et al.*, 317 F. Supp.2d 522 (S.D.N.Y. 2005); *NYC CLASH v. City of New York*, 315 F. Supp.2d 461 (S.D.N.Y. 2004); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp.2d 844 (N.D. Ohio 2004); *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001). *See also* article published by The Tobacco Control Legal Consortium: "There is No Constitutional Right to Smoke: 2008" (2d edition, 2008), by Samantha K. Graff, at R. 146-157, and available at: http://tclconline.org/.

distinguished from regulation of conduct of members.[13] "As such, these cases involve laws going directly to people's choices of whom to associate with. This ordinance, on the other hand, regulates what people can choose to do while associating. These are two different questions." [Exc. 30].

The United States Supreme Court has recognized a constitutionally protected "freedom of association" in "two distinct senses" – first, "the choice to enter into and maintain certain intimate human relationships," and second, "the right to associate for engaging in those activities protected by the First Amendment – speech, assembly, petition for redress of grievances, and the exercise of religion."[14] The Ordinance does not implicate either branch: it neither infringes upon the Eagles' right to enter into and maintain human relationships, intimate or otherwise, nor does it infringe upon the Eagles' right to associate for engaging in activities protected by the First Amendment. Cases from jurisdictions that have considered challenges to smoking ban laws on freedom of association grounds confirm this conclusion.

In *American Lithuanian Naturalization Club v. Board of Health of Athol*,[15] the Supreme Judicial Court of Massachusetts rejected arguments similar to those raised by the Eagles. In *American Lithuanian*, three membership associations challenged a town regulation that prohibited smoking in all public buildings and workplaces, including the

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[13] *Board of Directors of Rotary, Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995), *cert. den.* 515 U.S. 1145 (1995); *Chi Iota Colony, Fraternity v. City Univ. of New York*, 502 F.3d 136 (2nd Cir. 2002).

[14] *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

[15] 844 N.E.2d 231 (Mass. 2006).

premises of membership associations referred to as "private clubs."[16] The associations alleged that the regulation unlawfully restricted their freedom of association and infringed on their members' right to privacy.[17]

Like the Eagles, the associations in *American Lithuanian* were "private clubs" not generally open to the public; they had charters and bylaws stating their purposes, such as to "unit[e] members in the bonds of fraternity, benevolence and charity," "to uphold and defend the Constitution of the United States," "to foster and perpetuate one hundred percent Americanism," and to preserve their members' ethnic and cultural heritage; they were licensed by the commonwealth to serve alcoholic beverages; only adults were permitted to become members; guests were permitted only if accompanied by a member; members performed all labor at the clubs, including bartending; they conducted fundraising activities; their premises were open to the public only during sanctioned social events at which times the clubs prohibited all smoking and at all other times the doors were locked and signs posted to indicate members only.[18] The court held that the regulation did not infringe on the clubs' right to free association:

> The freedom of association encompasses the right to enter into and maintain certain intimate human relationships, and a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion. Although some members have threatened that they will no longer socialize at the clubs if smoking is not permitted, there has been no showing that enforcement of the town regulation will infringe the members' right

[16] *Id.* at 233-34.
[17] *Id.* at 234 – 235.
[18] *Id.* at 237.

> to maintain relationships with each other or to engage in First Amendment activities.[19]

As with the town regulation in *American Lithuanian*, the CBJ Ordinance does not prevent the Eagles from assembling for any of the club's purposes or functions, or engaging in First Amendment activities, or maintaining relationships with each other.

In the recent case *American Legion Post #149 v. Washington State Dep't of Health*,[20] the Washington Supreme Court rejected a freedom of association challenge to a statute and ordinance that prohibited smoking in any place of employment. Post #149, a local chapter of the American Legion, argued that the smoking ban violated its freedom of intimate association and constitutional privacy interest in smoking in a private facility. The court rejected both arguments.[21] The Post's argument on associational rights was similar to that made by the Eagles:

> The Post asserts one of its primary purposes is to provide a social atmosphere for its members and one of the essential attributes of this social atmosphere is smoking. Thus, the Post argues, a ban on smoking will impinge on these associations because the members, the majority of whom are smokers, will simply leave the Post and patronize tribal establishments, where smoking is allegedly allowed.[22]

In considering this claim, the court pointed out that "[o]ther courts have universally rejected challenges to smoking bans on the grounds they interfere with freedom of association."[23] The court concluded that the Post's claim that it had a fundamental right

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[19] *Id.* at 242 (quotations, citations, and footnote omitted).
[20] 192 P.3d 306 (Wash. 2008).
[21] *See infra* at pp. 33-35 for discussion of the court's right to privacy holding.
[22] 192 P.3d at 323.
[23] *Id.*

to allow smoking under freedom of association "must fail," stating: "Even if the Post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships, or a person's ability to join the Post."[24]

The courts have also upheld smoking bans against challenges that the laws violate the "expressive" branch of the freedom of association. In *NYC CLASH, Inc. v. City of New York,*[25] the plaintiff sought a declaratory judgment that state and city laws banning smoking in bars and food service establishments were unconstitutional. The plaintiffs asserted that the act of smoking in a bar or restaurant was sufficiently expressive conduct to merit protection under the First Amendment. Under this theory, freedom of expression would protect not only the choice of whom to associate with, but also the choice of what activities to engage in while associating. Finding that "First Amendment jurisprudence unequivocally rejects CLASH's constitutional enhancement hypothesis," the court held:

> The First Amendment guarantees the fundamental freedoms it enumerates, but not necessarily every purpose or form that exercise of the specific rights may take. Nothing in the Constitution engrafts upon First Amendment protections any other collateral social interaction, whether eating, drinking, dancing, gambling, fighting, or smoking-the list may be endless. While in some circles and events these social enhancements, by custom or practice, may be associated with and perhaps even augment the enjoyment of protected endeavors, it does not follow that they are indispensable conditions to the exercise of particular constitutional rights. The effect of CLASH's "association PLUS" theory would be to embellish the First Amendment with extra-constitutional protection for any ancillary practice adherents may seek to entwine around fundamental freedoms, as a consequence of which the government's power to regulate socially or physically harmful activities may be unduly curtailed.[26]

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[24] *Id.* at 323-24.
[25] 315 F. Supp.2d 461 (S.D.N.Y. 2004).
[26] *Id.* at 474.

Similarly, while the Eagles' members may engage in the sort of expressive association protected by the First Amendment, the Eagles make no claim that smoking is a part of a "belief" of the Eagles or "central to any expressive activities."[27] The Ordinance does not in any way regulate the charitable, civic, or political activities of the Eagles, and there is nothing to suggest that the Ordinance is aimed at the suppression of any expressive conduct. Rather, it is aimed at the act of smoking itself, and only when carried out in places that the Assembly has determined that smoking could adversely affect other people. The right of association "is not inherently accompanied by the unrestricted ability to smoke everywhere."[28] The Ordinance does not "infringe the members' right to maintain relationships with each other or to engage in First Amendment activities."[29]

The Players, Inc. v. City of New York[30] involved a private club that made many of the same arguments as the Eagles. In *Players*, a private club for actors challenged the constitutionality of statutory and municipal bans on smoking in bars and establishments that served food. Players, Inc., was described as a "relatively small, private, exclusive and secretive club" in which new members had to be nominated by existing members.[31] Players contended that the smoking bans "may dissuade Plaintiff's members or potential

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[27] *Id.* at 242, n.26. In fact, the Eagles acknowledge in their opening brief that "any attempt to conclusively link the ordinance with a chilling of the Eagles' expressive associational rights is difficult at best." Brief of Appellants at p. 13, n.19.
[28] 315 F. Supp.2d at 479.
[29] *Id.* at 242.
[30] 317 F. Supp.2d 522 (S.D.N.Y. 2005).
[31] *Id.* at 544.

members from engaging in social discourse" at the club "or from joining or maintaining membership" in the club, thereby substantially impinging their rights to freedom of association, assembly, and free speech.[32] Players also argued that a specific time-honored club practice – a "pipe ceremony" that involved the smoking of tobacco by members on the premises – was prohibited by the smoking ban, thereby unconstitutionally infringing on the members' freedom of expressive association.[33]

The court rejected these arguments, finding that the smoking bans "are entirely targeted at conduct – the act of smoking in certain places – rather than at speech, association, or assembly, which are not regulated by the statutes."[34] The court held that while the smoking bans restricted where a person may smoke, they did not "unduly interfere with smokers' right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity."[35] With regard to the pipe ceremony, the court found that the smoking bans did not prohibit the ceremony from taking place altogether, but rather "simply restrict[ed] one aspect of the conduct associated with the ceremony or the location at which the ceremony may take place."[36] "[T]he First Amendment does not compel government to facilitate the ease with which an individual may exercise associational rights."[37]

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[32] 317 F. Supp. 2d. at 543.
[33] *Id.* at 546.
[34] *Id.* at 543.
[35] *Id.* at 545, quoting *CLASH v. City of New York*, 315 F. Supp.2d at 473.
[36] *Id.* at 546.
[37] *Id.* at 546, quoting *CLASH*, 315 F. Supp.2d at 475.

C. Even if the Ordinance implicates freedom of association, the Eagles' claim fails because the Eagles do not qualify as a form of "intimate" association.

As the superior court correctly concluded, it is not necessary to decide whether the Eagles is an "intimate association" because "[w]hether or not the club is an intimate association, this ordinance does not infringe upon its members' right to associate with whomever they choose." [Exc. 34]. Considering the question, though, even if the Ordinance does implicate freedom of association, the Eagles do not qualify as a form of "intimate" association.

The Eagles contend that because the club is small, has membership criteria and guest policies, members partake in a secret Ritual, and members consider the club an extension of their home, the associational relationship is "intimate."

In *Roberts v. United States Jaycees*,[38] the Court held that application of the Minnesota Human Rights Act to require the Jaycees to accept women as regular members did not abridge the male members' freedom of intimate association. The Court distinguished between family relationships, which "by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares...distinctly personal aspects of one's life," from associations lacking these qualities such as a large business enterprises.[39] Noting that "between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims

[38] 468 U.S. 609 (1984).
[39] *Id.* At 620.

to constitutional protection from particular incursions by the State,"[40] the Court indicated a number of factors relevant to determining the nature of an associational interest, including size, purpose, policies, selectivity in decisions to begin and maintain the relationship in question, and congeniality as potentially pertinent.[41] With respect to the Jaycees, the Court found that several features of the club placed it outside the category of highly personal relationships. Based upon their large size and the fact that they were basically "unselective" groups, the Court found that the Jaycees lacked "the distinctive characteristics" that would have made the club worthy of constitutional protection.[42]

The Juneau-Douglas Aerie 4200 similarly lacks any "distinctive characteristics" that would make it worthy of protection. First, as was the case with the Minneapolis and St. Paul Jaycees chapters with 430 and 400 members respectively, the Eagles' membership is not small. Indeed, the Eagles have a substantially greater proportion of members to local population than was the case with the local Jaycees chapters in *Roberts*, with 262 full members and 134 members of the Ladies' Auxiliary, for a total of 396 members in a city of 30,000. [Exc. 35]. Second, the Eagles' membership criterion is similarly basically unselective. Applicants for membership to the Eagles must be nominated by two members, be at least 21 years old, of good moral character, not connected to the Communist Party or wishing to overthrow the government, profess belief in a Supreme Being, and not have been expelled from any other organization.

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[40] *Id.* at 620.
[41] *Id.*
[42] *Id.* at 620 – 621.

[Exc. 35]. With all due respect to the Eagles' organization, the criteria for membership in the club is not particularly exclusive, and in no way compares to those relationships having such a "high degree of selectivity" that the U.S. Supreme Court has found worthy of constitutional protection such as those involving the choosing a life partner, or spouse.[43]

As outlined by the *Roberts* Court, congeniality, purpose, and policies are also factors to be considered.[44] The Eagles assert that their club is like a family and they call the facility the "Aerie Home" and repeatedly describe it using terms such as a "private extension of the members' homes," "a place of comfort and relaxation, very much akin to a home," and having a "home-like atmosphere." Brief of Appellants, pp. 4, 6, 9, 18, 34, 41. However, the Eagles club is nothing like a private home or family. Indeed, it is remarkably different from a private home or family in nature: the Eagles is a nonprofit corporation organized for charitable and social purposes. It charges membership fees and has employees. [Exc. 24-25]. It holds a state liquor license and its employee/member bartenders sell alcoholic beverages at a bar in the facility. [Exc. 25]. Guests must be sponsored by a member who is present and may visit three times; after that the guest is expected to apply for membership. [Exc. 25]. The Eagles may hold fundraising events for their charitable causes and the Eagles' facility is open to the public for those events. [Exc. 23]. The Eagles' charitable-giving functions involve numerous outside

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[43] *See* discussion of *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655 (Wash. 2002) (en banc), *infra* at pp. 22-24 and cases at n.59.

[44] 468 U.S. at 620.

organizations and people. [Exc. 22-23]. The "Ritual" is a private event along the lines of a church liturgy and is performed only in the facility and only members may observe it. [Exc. 22].

While friendships forged between club members are no doubt important to them, and members may well enjoy the club as a place to "drink, socialize, play various games, and, yes, smoke a cigarette or two,"[45] that is hardly the stuff of "intimate human relationships" such as those between parent and child, spouses, or life partners. Moreover, nothing in the Ordinance prevents members from smoking a cigarette or two with whomever they want to smoke – if members want to smoke, they can simply step outside the building, just as members, guests, and patrons must do at any other private club, bar, or other enclosed space in Juneau where alcoholic beverages are sold or food is offered for sale.

The Eagles rely heavily on *Louisiana Debating & Literary Ass'n v. City of New Orleans.*[46] *In Louisiana,* four clubs challenged the application to them of an ordinance prohibiting discrimination in places of public accommodation. The ordinance exempted "distinctly private entities" and the question was whether the clubs were "distinctly

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[45] Brief of Appellants, p. 18.

[46] 42 F.3d 1483 (5th Cir. 1995). The Eagles also rely upon *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), though as with most of the cases cited in the Eagles' brief, there is no substantive discussion of the underlying facts of the case or how or why the case bolsters the Eagles' position. Applying the *Roberts* factors to the Rotary International club and its members, the Supreme Court found that the Rotary Club members' relationships with each other were not sufficiently intimate or private to warrant constitutional protection. *Id.* at 546. Besides the general language the Eagles pull from the case, it does not provide support for a decision in the Eagles' favor.

private" in character as that term was defined in the ordinance.[47] The court applied the factors set out in *Roberts* and determined that the clubs met the definition of "distinctly private" and were entitled to the fullest protection of their associational rights under the First Amendment. The court found that the clubs had a long history of "existing exclusively for private, social purposes."[48] The clubs prohibited the transaction or discussion of any business on their premises.[49] No signs were located outside the clubs' buildings to identify the locations to the public.[50] The clubs were for the exclusive use of members and guests, and nonmembers were "strictly prohibited from using the facilities."[51] The guest policies were "severely limited."[52] For example, at one of the clubs members were prohibited from "bringing or inviting male guests, at any time and under any circumstances."[53] At another one of the clubs, male residents of the city were strictly forbidden to attend as guests, while women residents could be guests if accompanied by a member, but only "on extraordinary occasions."[54] None of the clubs were associated with or controlled by a national organization.[55] The clubs also restricted membership to a limited number and by their "very restrictive" policies, sought "to

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[47] 42 F.3d at 1486.
[48] *Id.* at 1495.
[49] *Id.*
[50] *Id.* at 1496.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1496.
[54] *Id.* at 1497.
[55] *Id.*

remain isolated."[56] Under these facts, the court found that the clubs qualified as "intimate" associations entitled to the fullest protection of their associational rights.

The Eagles assert that that they "are very much like the clubs described in *Louisiana*...." Brief of Appellants, p. 16. The Eagles' policies and practices on guests and nonmembers, as well as their purposes, are not like those of the clubs in *Louisiana*. The Eagles club is a local chapter of a large international organization and is controlled by the policies of that organization. [Exc. 32]. The club does not seek to isolate itself from the community – a primary purpose of the Fraternal Order of Eagles is charitable fundraising and giving to benevolent causes in the community; indeed, "there is an obligation to render service to the community." [Exc. 22-23]. The Eagles are <u>not</u> like the clubs in *Louisiana*. They <u>are</u>, however, very much like the clubs described in the *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, a 2002 decision of the Washington Supreme Court.[57]

In *Tenino*, chapters of the Fraternal Order of Eagles and their female members brought suit against the international and state organizations (Grand Aerie) challenging their refusal to admit new female members. They alleged that the Grand Aerie's male-only policy violated the Washington law against discrimination. Just as in *Louisiana*, the state law required a fraternal organization to be "distinctly private" in order to qualify for exemption under the law.[58] The Grand Aerie contended that application of the state law

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[56] *Id.*
[57] 59 P.3d 655 (Wash. 2002) (en banc).
[58] *Id.* at 657.

to require them to admit women as members would violate the current members' First Amendment rights to freely associate.[59] The trial court ruled for the plaintiffs, and the court of appeals reversed. The Washington Supreme Court reversed the court of appeals.

The court analyzed the nature of the Fraternal Order of Eagles by applying the factors enumerated by the Court in *Roberts*,[60] and held that the (Washington) Eagles were not distinctly private. The court's detailed description of member selection criteria, secret rituals, guest and nonmember policies, purposes, functions, *etc.*, of the local chapters and the Grand Aerie reads remarkably like Appellant Eagles' description of their local chapter and the Grand Aerie.[61] The Washington Supreme Court quoted at length from the trial court's decision on the nature of the Fraternal Order of Eagles, wherein the trial court concluded that "the selectivity of membership is minimal in the Eagles"; "the size of the Eagles and the local Aeries would militate against a finding that Fraternal Order of Eagles is distinctly private"; and "the Eagles are an active outreach organization in the community that involves community members to participate in projects to aid other community members who are nonmembers and involves nonmembers in the activities of the organization from time to time...."[62] In summary, the trial court concluded:

> There is nothing about the Fraternal Order of Eagles, almost a million strong across this country, that tells me that its goals, its purpose or its conduct is distinctly private. It is the opposite. And I congratulate the

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[59] Notably, the *Tenino* case is unquestionably about associational rights – actual membership in the association – rather than about the conduct of existing members, as is the case here.

[60] *Roberts*, 468 U.S. at 620.

[61] *Fraternal Order of Eagles*, 59 P.3d at 657-58.

[62] *Id.* at 660.

> Eagles because of that. I think that's what makes it vital and valid and wonderful.[63]

The Washington Supreme Court agreed, holding that the Eagles were not distinctly private.[64] "Put another way, the relationships among Eagles members are not so intimate as to afford the group constitutional protection in the decision of its members to exclude women."[65] The same is true in Juneau. With its 396 members, the appellant Eagles are not "so intimate" as to afford the group constitutional protection under freedom of association in the decision of its members to smoke inside the facility.[66]

In summary, even if the Ordinance, as applied to the Eagles, implicates their freedom of association, it does not violate that right whether analyzed under the concept of "expressive" association or the concept of "intimate association." The Eagles have acknowledged that they have no "expressive association" case,[67] and the relevant case law establishes that the Eagles do not qualify for protection under the "intimate association" branch of the freedom of association.

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[63] *Id.* at 661.
[64] *Id.* at 671.
[65] *Id.* at 674 (concurring opinion).
[66] *See also Human Rights Comm'n v. Benevolent and Protective Order of Elks*, 839 A.2d 576 (Vt. 2003) (public accommodation law applies to fraternal clubs that possess indicia of being a public club despite claim to being distinctly private); *Fraternal Order of Eagles, Inc., Tucson Aerie #180 v. City of Tucson*, 816 P.2d 255, 258-59 (Ariz. Ct. App. 1991) (ordinance prohibiting sexual discrimination did not violate Fraternal Order of Eagles members' right to freedom of association; held Fraternal Order of Eagles did not qualify as intimate association under *Roberts* factors, and "slight infringement" on members' right of expressive association justified by city's compelling interest in eradicating sexual discrimination). Again, these cases implicate the right of association to a far greater degree than does the present case.
[67] Brief of Appellants, p. 13, n.19.

III. THE ORDINANCE DOES NOT VIOLATE THE EAGLES' RIGHT TO PRIVACY UNDER THE ALASKA CONSTITUTION.

Article I, section 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed." This Court has held that Alaska's express privacy provision provides more protection of individual privacy rights than does the United States Constitution.[68]

A. The conduct at issue – smoking inside a "private club" that is licensed to sell alcoholic beverages – is not a fundamental right under Alaska's right to privacy.

This Court's privacy jurisprudence is centered on protecting the privacy of the home, and on protecting the right to control one's own body. "Privacy in the home is a fundamental right under both the federal and Alaska constitutions."[69] In addition, the "right of privacy protects 'fundamental rights of personal autonomy.'"[70]

Neither aspect of the right to privacy is implicated in this case. First, regardless of how many times the Eagles try to equate their club to a private home, the Eagles' facility is not a home; it is a bar. Second, smoking inside a club such as the Eagles' facility is not a fundamental right of "personal autonomy" as that concept has been defined by this Court.

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[68] *Ravin v. State*, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J., concurring); *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1981); *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997).

[69] 537 P.2d at 504.

[70] *Ranney v. Whitewater Engineering*, 122 P.3d 214, 221 (Alaska 2005), quoting *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001).

1. The fundamental right of privacy within the home does not apply to the Eagles' facility or conduct within the facility.

Alaskans "have a basic right of privacy in their homes under Alaska's constitution."[71] In an apparent effort to fit their facility within this concept, the Eagles call their club the "Aerie Home" and repeatedly refer to it using terminology such as "an extension of their personal residences." Brief of Appellants, p. 18. Use of such terminology does not change the fact that the Eagles' Aerie is not anyone's home. It is a facility owned and operated by a nonprofit corporation organized under the laws of Alaska. Its internal practices and procedures are controlled by a detailed set of policies issued by the Fraternal Order of Eagles, an international organization with thousands of members and hundreds of local chapters. [Exc. 21]. The Eagles holds a liquor license and is subject to the State of Alaska's comprehensive statutory scheme regulating the sale of alcoholic beverages. While the members go to the Eagles' facility to socialize, they do not live there. New membership in the club is open, under a process prescribed by the Fraternal Order of Eagles. [Exc. 24]. Four times a year, the facility is open to the public for fundraising events. [Exc. 23]. A home is a person's private residence – the place where a person lives. The Eagles' facility is not a home, or even close to a home, in nature.

A person's home (as opposed to a place where someone may "feel at home") is the place this Court has recognized as a having a "distinctive nature" where "the individual's

[71] *Ravin*, 537 P.2d at 504.

privacy receives special protection."[72] In discussing *Ravin* in *Sampson v. State*, the Court emphasized the uniquely special nature of the home in terms of the right to privacy:

> In *Ravin v. State,* we reviewed the claim that the consumption of marijuana was a fundamental right under our constitution. We held that it was not, but we did recognize the fundamental right of privacy within the home. We noted the "distinctive nature of the home" in Alaska's statutory and jurisprudential history in finding that the privacy amendment "was intended to give recognition and protection to the home." We also recounted the importance of individual autonomy in Alaskan history and concluded that the right to privacy in the home is directly linked to a notion of individual autonomy. And privacy within the home, we emphasized, is vital: "If there is any area of human activity to which a right of privacy pertains more than any other, it is the home." Based on these considerations, we ultimately concluded that the right of privacy within the home protected personal possession and consumption of small quantities of marijuana in the home.[73]

And, even within the home, the right to privacy[74]

> must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely.

The Eagles' Aerie is not a private residence, which is the essential characteristic that defines one's home. Therefore, members, guests, employees, and other persons, are not entitled under Alaska law to a heightened right of privacy with respect to their conduct within the Eagles' facility.

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[72] 537 P.2d at 503.

[73] *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001) (footnotes omitted) (emphasis added). *See also Walker v. State*, 991 P.2d 799, 801 (Alaska App. 1999) ("people...have a heightened expectation of privacy with respect to their personal activities within their home"); *Gurhart v. State*, 147 P.3d 746, 750-51 (Alaska App. 2006) ("the *Ravin* decision rested on a person's heightened right of privacy with respect to their conduct within their own home").

[74] 537 P.2d at 504.

2. Smoking is not a fundamental right of personal autonomy under Alaska's right to privacy.

This Court has recognized that the right to privacy protects "fundamental rights of personal autonomy."[75] The case law establishes that these rights involve situations concerning the right to control one's own body or to direct the course of fundamentally important personal aspects of our lives, including the right to make reproductive choices,[76] the right to control one's appearance,[77] a patient's interest in protecting sensitive personal information from public disclosure,[78] the right not to be forced to take psychotropic drugs,[79] and the right to make decisions about medical treatment for oneself or one's children.[80] In establishing these rights, this Court has looked to "the history and tradition of a right in Alaska" as important in determining "whether the right falls within the intention and spirit of our constitution"[81] because "history and tradition tend to define our society's expectations of what rights are necessary for civilized life and ordered liberty."[82]

The Eagles ask this Court to hold that the choice of whether to smoke tobacco in a private club that is licensed to sell alcoholic beverages, and is a place where smokers and nonsmokers alike congregate to socialize and engage in various events, is a fundamental

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[75] 31 P.2d at 94.
[76] 948 P.2d at 969.
[77] *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972) (decided prior to adoption of AK Const. art. I, § 22).
[78] *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 480 (Alaska 1977).
[79] *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 246 (Alaska 2006).
[80] *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009).
[81] 31 P.3d at 94.
[82] *Id.*

right of personal autonomy under Alaska's right to privacy. The CBJ submits that the choice of whether to smoke under these circumstances is not a fundamental right of personal autonomy under Alaska law. This Court's decisions involving laws regulating the ingestion of substances into one's body, as well as the history of smoking regulation in Alaska, support this conclusion.

In considering the effect of article I, section 22, the *Ravin* court explained:

> We have suggested that the right to privacy may afford less than absolute protection to 'the ingestion of food, beverages or other substances'. For any such protection must be limited by the legitimate needs of the State to protect the health and welfare of its citizens.[83]

The Court went on to hold that "the right to privacy amendment...cannot be read as to make the possession or ingestion of marijuana itself a fundamental right."[84]

In *State v. Erickson*, the Court held that the "rights to privacy and autonomy involved cannot be read so as to make the ingestion, sale or possession of cocaine a fundamental right."[85] In *Harrison v. State*, the Court held that the consumption of alcoholic beverages – even in the home – is not a fundamental right.[86]

While each of these substances has different effects on the body and, as the superior court pointed out, one could debate whether marijuana is a more or less dangerous drug than tobacco or alcohol, "the principle is the same: the choice whether to

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[83] 537 P.2d at 501, quoting *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (footnotes omitted).
[84] *Id.* at 502.
[85] *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).
[86] *Harrison v. State*, 687 P.2d 332, 338 (Alaska 1984).

ingest these substances into one's body has been found not to implicate the fundamental right of personal autonomy." [Exc. 40].

The Eagles' argue that the CBJ's prohibition on smoking inside the club violates the privacy clause of the Alaska Constitution because, according to the Eagles, the smoking does not harm anyone who does not choose to expose themselves to the harmful effects of smoking. This Court has on several occasions rejected the argument that the government may not abridge any aspect of personal privacy unless it poses a threat of harm to another.[87] Further, a smoker who exposes a nonsmoker to second-hand smoke "undeniably causes harm to others" regardless of whether the nonsmoker "consents" to the exposure.[88]

Smoking regulations have been on the books for many years in Alaska. Stating that "[s]moking in any form is a nuisance and a public health hazard," the Alaska Legislature has regulated smoking in certain public and private places since at least 1975. *See* AS 18.35.300 – AS 18.35.365. The adverse public health impacts of smoking and exposure to second-hand smoke have become increasingly well known over the last 35 years. In Juneau, smoking has been regulated by the municipality for nearly a decade now. [Exc. 49]. The Assembly amended the smoking ordinance over time to expand the places where smoking is prohibited, which directly reflects the community's – and its

[87] 574 P.2d at 21 ("[n]o one has an absolute right to do things in the privacy of his own home which will effect himself or others adversely"); 687 P.2d at 338; 31 P.3d at 95.
[88] 31 P.3d at 95 (rejecting argument that state could not regulate any aspect of right to privacy in the absence of a threat of harm to others and holding physician-assisted suicide not a fundamental right under Alaska's privacy clause).

local governing body's – increased knowledge and awareness of the public health consequences of exposure to second-hand smoke.

Municipalities all across Alaska have enacted ordinances regulating smoking to one degree or another.[89] CBJ's prohibition on smoking in private clubs is similar to how the Municipality of Anchorage addresses this issue in its "Secondhand Smoke Control Ordinance," Anchorage Municipal Code Chapter 16.65, which became effective in its current form on July 1, 2007. Under AMC 16.65.010(A)(8), smoking is prohibited in all areas within five feet of the entrance to a premises licensed under state law to sell alcoholic beverages for consumption on the premises. Smoking is also prohibited in all enclosed areas that are places of employment. AMC 16.65.010(a)(2). Under AMC 16.65.030, smoking is not prohibited in a private club that is not licensed to sell alcoholic beverages under state law and is not a place of employment. Therefore, if a private club is licensed to sell alcoholic beverages, or is a place of employment, smoking is prohibited in the private club under the Anchorage Municipal Code.

On June 8, 2010, the Assembly of the City and Borough of Sitka enacted Ordinance No. 2010-09, which, if approved by the voters at the October 5, 2010 municipal election, will expand Sitka's smoking ordinance to prohibit smoking in more places, "including bars as well as in private clubs that are licensed by the State of Alaska

[89] *See* Anchorage Municipal Code Chapter 16.65; Kenai Municipal Code 12.40.030; Soldotna Municipal Code 8.20.020; City of Fairbanks Code Sec. 34-114 – 34.119; City of Homer Code 5.05.010 - .040.

to sell alcohol or food." Section 3, Sitka Ord. No. 2010-09.[90] Section 3 also points out that "[m]any of the amendments to [Sitka's smoking ordinance] are modeled after amendments to similar provisions in the municipal codes for Anchorage and Juneau."

On June 7, 2010, the City Council for the City of Petersburg adopted Ordinance #942, entitled the "Smoke Free Air Act of 2010." As a public health and welfare measure, the City Council "recognize[d] the need to breathe smoke free air shall have priority over the desire to smoke." Ordinance # 942, Section 2. The City Council chose to submit the ordinance to the voters and, if it is approved by the voters at the municipal election on October 5, 2010, the ordinance will go into effect on November 1, 2010. As with the Sitka ordinance going to the voters, the Petersburg ordinance would prohibit smoking in private clubs. Section 9.32.050 of Ordinance # 942 provides that "[s]moking shall be prohibited in all private clubs." "Private club" is defined in Section 19.32.010, and that broad definition would encompass a club such as the Eagles.

Thus, although people have long smoked in the United States, "[s]ince 1964, when the Surgeon General first reported the dangers of smoking, public perception of smoking has been steadily changing" and "the tradition of acceptance or silent tolerance of smoking has been replaced by strong expression against both smoking and passive exposure to tobacco smoke."[91] The clear trend in Alaska is that more and more

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[90] If approved by the voters, the ordinance will delete Sitka General Code 9.20.030(G) and (H), which sections were cited by the Eagles' in their opening brief. Brief of Appellants at p. 27.

[91] Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 Geo. L.J. 783, 801-02 (1998).

municipalities are adopting increasingly restrictive ordinances on smoking – including prohibiting smoking in private clubs – in response to their citizens' desire for clean air. Smoking regulation is a matter of public and social policy that appropriately falls within the legislative arena. To paraphrase from *Sampson*, by broadly construing the privacy amendment to include the right to smoke, this Court would run the risk of arrogating to itself those powers to make social policy that as a constitutional matter belong only to the legislative body.[92] In short, smoking in places where alcoholic beverages are sold or food is offered for sale should not be deemed a fundamental right under Alaska's right to privacy.

B. Courts in jurisdictions that have considered challenges to smoking bans on right to privacy grounds have consistently held that smoking is not a fundamental right under the right to privacy.

Although this Court has not previously considered whether smoking is protected by the right to privacy, the issue has been addressed by courts in other jurisdictions. Courts that have considered this issue have uniformly held that smoking is not a fundamental right protected by the right to privacy.

In *American Legion Post #149 v. Washington State Dep't of Health*,[93] the court held that smoking inside a private club was not a fundamental privacy right under either the state constitution or the federal constitution. Noting that it is "well-settled law" that the explicit right to privacy in the Washington Constitution may provide greater protection than the federal constitution, the court held that it did not in the context of

[92] 31 P.3d at 98.
[93] 192 P.3d at 320-23.

smoking inside a private facility. Under Washington law, enhanced state constitutional privacy protection depends on whether there has been an intrusion into a person's private affairs. In making that determination, the court engages in a two-step analysis: (1) what privacy interests citizens have historically held, and (2) whether the expectation of privacy is one that citizens should be entitled to hold. Smoking inside a private club met neither of those criteria.

First, the Washington court rejected the Post's argument that as a private facility, it had an historical right to be free from governmental interference. The court held that all persons, including private clubs, hold their property, and are entitled to enjoy and use it, subject to a reasonable exercise of the state's police powers, including the preservation of health.[94] Second, after discussing cases establishing that "[s]tate's have regulated smoking since the 1800s," the court concluded that "governmental regulation of smoking and tobacco products is not a recent phenomenon and, as such, there is no traditional expectation of privacy in this context."[95] Thus, the Post had not demonstrated that the Washington State constitutional right to privacy provided greater protection than the federal constitution in the context of smoking inside a private facility.

Next, the Washington court considered the Post's claim under the federal constitution's implicit right to privacy. Under Supreme Court precedent, the interest in personal autonomy and autonomous decision making is a recognized fundamental right.[96]

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[94] *Id.* at 320-21.
[95] *Id.* at 321.
[96] *Id.* at 321-22.

After a thorough analysis of the federal case law, the court concluded that "[s]moking is not a fundamental right" and "[b]ecause there is not a fundamental right to smoke, there is no privacy interest in smoking in a private facility."[97]

In *Foundation for Independent Living, Inc., et al. v. Cabell-Huntington Board of Health*,[98] business owners and nonprofit organizations brought an action challenging a local health board's clean indoor air regulation that restricted smoking in enclosed public places. Among other claims, they asserted that the regulation could not ban smoking in private areas such as offices and conference rooms without infringing on an individual's fundamental right to privacy. The court recognized that while a place that is "truly and exclusively" private, "like one's own home," was beyond the scope of the regulation, a private office or private conference room in an enclosed public place was not truly and exclusively private: employees and others were at risk of being exposed to tobacco smoke by entering such place.[99] In addition, some of the opponents held state liquor licenses as "private clubs" under West Virginia law. The court found that there was "no constitutional or legislative bar to such establishments being subject to the provisions of smoking regulations, or any other type of health or safety regulations" where the clubs were subject to regular inspections for other purposes deemed necessary for public health and safety such as fire code requirements and food safety.[100]

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[97] *Id.*
[98] 591 S.E.2d 744 (W.Va. 2003).
[99] *Id.* at 754.
[100] *Id.* at 754-55.

In *American Lithuanian Naturalization Club v. Board of Health of Ahtol*,[101] the associations argued that as their private club premises were locked and not open to the public, the regulation of activities such as smoking inside the buildings was a violation of their right to privacy. The Massachusetts court rejected that argument, holding that the smoking regulation was "not an 'unreasonable, substantial and serious interference' with the right of privacy of the associations and their members in violation of state law."[102]

In *Fagan v. Axelrod*,[103] petitioners were regular users of tobacco products in public and private places, both indoors and out-of-doors. They challenged New York State's Clean Indoor Air Act, contending, among other things, that the law impermissibly intruded upon the right of a citizen to be "let alone" in the conduct of his private affairs and violated their alleged "right of liberty and privacy to smoke."[104] The court concluded that regulation of smoking was a valid exercise of the police power, and that there "is no more a fundamental right to smoke cigarettes than there is to shoot-up or snort heroin or cocaine or run a red light."[105]

The CBJ submits that this Court should consider these decisions in addition to this Court's right to privacy decisions, in determining whether smoking inside a private club that is licensed to sell alcoholic beverages is a fundamental right under Alaska's right to privacy. In determining whether an activity came within the state constitutional

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[101] 844 N.E.2d 231 (Mass. 2006)
[102] *Id.* at 242.
[103] 550 N.Y.S.2d 552 (N.Y. Sup.Ct. 1990).
[104] *Id.* at 558.
[105] *Id.* at 559 (citations omitted).

fundamental right to privacy, the court in *American Legion Post #149* looked to what privacy interests citizens have historically held, and whether the expectation of privacy is one citizens should be entitled to hold. The court found that a private club has no historical right to be free from governmental regulation and that there is no historical privacy interest in smoking. Similarly, in determining whether an activity is a fundamental right of personal autonomy under the Alaska Constitution, this Court in *Sampson v. State* explained that:

> history and tradition of a right in Alaska are important because they help to determine whether the right falls within the intention and spirit of our constitution. Moreover, history and tradition tend to define our society's expectations of what rights are necessary for civilized life and ordered liberty. [105]

There is no historical support in Alaska, either in the case law or legislative law, for the proposition that smoking tobacco inside a private club that is licensed to sell alcoholic beverages, has employees, and has both smoking and nonsmoking members, falls within Alaska's fundamental right to privacy. On the contrary, this Court's decisions in *Ravin*, *Erickson*, and *Harrison* indicate that there is no such historical right. Like the private club in *American Legion Post #149*, the Eagles holds its property subject to the reasonable exercise of the police power, whether that power be exercised through state regulation of alcoholic beverages, local fire code regulation and inspection, or local smoking regulation – all are reasonable exercises of police power in furtherance of public health, safety, and welfare. Further, smoking has been regulated by state and local

[105] 31 P.3d at 94.

governing bodies across Alaska (and the United States) for many years. There is no historical privacy interest in smoking in Alaska, and the Eagles do not have an historical right to be free from governmental regulation. Accordingly, this Court should conclude that smoking inside a private club that is licensed to sell alcoholic beverages is not a fundamental right within the core meaning of Alaska Constitution's privacy clause.

C. The Ordinance passes scrutiny under the "legitimate interest" test: there is a close and substantial relationship between the prohibition on smoking inside the specified private clubs and a legitimate governmental interest.

Smoking inside a place like the Eagles' club is not a fundamental right under the right of privacy. Therefore, the "legitimate interest" test is the correct level of scrutiny to be applied in reviewing the Ordinance:

> when state action limits non-fundamental privacy or liberty interests, the state must identify a legitimate governmental purpose and show that the challenged limitation bears a close and substantial relationship to that purpose.[106]

The traditional police power of the states and municipalities includes the authority to provide for the public health and safety. Secondhand smoke causes severe injury and death. Protecting the public's health and safety from the dangers of second-hand smoke is undoubtedly an important government interest. CBJ has a legitimate interest in protecting the citizens of Juneau from the adverse health impacts of second-hand smoke. The means chosen to advance that interest – the Second-Hand Smoke Control Code, CBJ 36.60 – bears a close and substantial relationship to that interest. To reduce the incidence of exposure to second-hand smoke, the Ordinance prohibits smoking in a wide variety of

[106] 31 P.3d at 95-96 (footnote omitted).

enclosed public places, places of employment, and private clubs that are licensed to sell alcoholic beverages. The serious public health consequences of tobacco use and exposure to second-hand smoke are well known. Given that fact, and as stated by the superior court, "an ordinance prohibiting smoking in specified places where people gather indoors is justifiable as a public health and welfare measure." [Exc. 41].

The next question is whether the means chosen by the CBJ bear a sufficiently close and substantial relationship to the purpose of protecting public health and welfare. The answer is yes. First, under the legitimate interest test, the CBJ did not need to choose the least restrictive means to accomplish its purpose.[107] Thus, while the Assembly could have chosen to enact a less restrictive smoking ban – one that did not cover private clubs that hold liquor licenses – in terms of protecting public health, that is not what the duly elected Assembly chose to do. Instead, the CBJ Assembly, as a matter of public policy, decided to adopt a smoking ban ordinance that covers such private clubs, thereby doing everything it reasonably could to help protect nonsmokers who may be in the club or have access to the club, from the impacts of second-hand smoke. At those places, a smoker must step outside to smoke, thereby not endangering the health of nonsmokers, and other smokers, who may be in, or have access to, the enclosed place. CBJ 36.60.025. Protecting the health of Juneau's citizens from the dangers of second-hand smoke would have been less effectively achieved if people were allowed to smoke inside private clubs that sell alcohol. And, of course, other bars might decide to become private clubs.

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[107] *See, e.g., Stevens v. Matanuska-Susitna Borough*, 146 P.3d 3 (Alaska App. 2006).

The Eagles argue that their members should be able to choose to expose themselves to the harmful effects of second-hand smoke inside the club. The Eagles argue that the Ordinance goes too far because the right to privacy gives Alaskans the right to engage in conduct that harms only themselves and others who "consent" to expose themselves to the conduct. This Court rejected that very argument in *Sampson*, concluding that its privacy decisions could not be read to support the argument that "the government may not abridge any aspect of personal privacy unless it involves a threat of harm to another."

> In *State v. Erickson*, for example, we stated that "[n]o one has an absolute right to do things in the privacy of his own home which will affect *himself or others* adversely." Other Alaska cases, too, have upheld regulation of private conduct where the only harm threatened was to the actor.[108]

In our case, the activity at issue (smoking) affects not only the actor, but others as well – both smokers and nonsmokers – who choose to gather at the Eagles' facility. The fact that these people may choose to be there voluntarily does not preclude the CBJ from prohibiting smoking in such an establishment. As the superior court correctly concluded, if that were the case, "then no anti-smoking ordinance could be upheld as long as other persons present were there voluntarily." [Exc. 44].

The CBJ has a strong interest in addressing the public health impacts of second-hand smoke. The Assembly has chosen to prohibit smoking in a range of indoor locations where people gather together, including inside private clubs that are licensed to sell alcoholic beverages. It was reasonable for the Assembly to conclude that the

[108] 31 P.3d at 95 (emphasis in original; footnotes omitted).

prohibition will reduce the incidence of exposure of people to second-hand smoke, a known human carcinogen. This was a policy decision by the Assembly – a policy decision that the Eagles clearly disagree with. As a constitutional matter, this policy decision rests with the Assembly as the municipality's governing body, and the Court should give "great deference" to the Assembly's action.[110] As this Court stated in *Concerned Citizens of South Kenai Peninsula,*

> It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people.[111]

For these reasons, the Court should find that there is a close and substantial relationship between the provisions of the Ordinance relating to private clubs and the legitimate governmental interest in furthering the public health.

D. Even if smoking inside a private club is a fundamental right, the Ordinance passes scrutiny because the CBJ can show a compelling interest in prohibiting smoking inside such a place.

The Ordinance does not infringe on any fundamental right recognized under Alaska's privacy clause. But even if it did – even if there were a fundamental right to smoke in a private club that is licensed under state law to sell alcoholic beverages – it should be upheld because the CBJ can articulate both a compelling interest in reducing the exposure of people to second-hand smoke and the absence of a less restrictive alternative.

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[110] 50 P.3d at 804; AK Const. art. X, §§ 1 and 11.

[111] *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974).

The serious health impacts of exposure to tobacco smoke are well-known. There is no safe level of exposure to tobacco smoke. The courts have recognized that the enactment of smoking bans for workplaces, bars, restaurants, and private clubs – essentially all those places where people gather outside the home – is a valid and reasonable legislative reaction to the well-documented health dangers posed by exposure to smoke. The social and monetary cost of health problems associated with smoking and exposure to smoke is staggering. In this case, the place at issue is the premises of a corporation, the Eagles, that operates a club facility where people gather to socialize and participate in various events both private and public. The corporation is licensed to sell alcoholic beverages on the premises. It operates a bar in the facility and employs bartenders. Club members may or may not be smokers. Members are allowed to bring guests, and the guests may or may not be smokers. Even if members of the Eagles who are smokers choose to disregard the overwhelming evidence of health consequences of smoking, the CBJ Assembly could rationally be concerned about the exposure of nonsmokers to smoke – and that concern does not go away simply because the nonsmoker allegedly "consents" to exposure.

As the local governing body, the Assembly has a compelling interest in protecting the health and welfare of every member of this community to the extent reasonably possible. Is the Ordinance perfect? Surely not. As pointed out by the Eagles, the Ordinance could be broader with regard to the provisions on smoking in places of

employment – and perhaps it should be broader.[111] But that is a policy decision for the Assembly. Perfection is not a requirement in order for legislation to be valid.

Most importantly, the fact remains that there a compelling interest at stake – the interest in promoting public health by minimizing the incidence of exposure to tobacco smoke inside places where people gather outside the home – and there is no less restrictive way of protecting the public health when it comes to second-hand smoke inside private clubs that sell alcohol. A person inside such a private club will either be exposed to smoke if there is no prohibition on smoking, or will not be exposed to smoke if there is a prohibition on smoking. The Ordinance is narrowly tailored to cover those enclosed places where it is most likely that numerous people will gather, such as bars, restaurants, private clubs that sell alcoholic beverages or food, and places of employment with more than four employees. It is far more likely that a large number of people will gather to socialize and engage in various activities, and for longer periods of time, at a bar, a restaurant, or a bar operated in a private club than it is that they will do so at a place of employment with four or fewer employees. Thus, the Ordinance prohibits smoking in the former places, but not the latter, in advancing the CBJ compelling interest in maximizing clean air inside places people gather outside the home.

The Ordinance does not violate fundamental rights, and even if it does, it should be upheld. Under Alaska law, the CBJ's exercise of its police powers must be given a

[111] Brief of Appellants at pp. 25-26.

liberal construction.[112] A duly enacted ordinance is presumed to be constitutional, and this Court should construe the Ordinance to avoid a finding of unconstitutionality to the extent possible.[113] Thus, the Eagles' claims must fail.

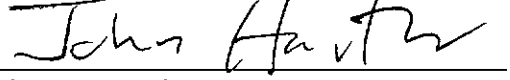
CONCLUSION

This Court should affirm the superior court's judgment granting summary judgment to the CBJ and denying summary judgment to the Eagles.

DATED: July 14, 2010, at Juneau, Alaska.

Respectfully Submitted,

CITY AND BOROUGH OF JUNEAU

By: 

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[112] Alaska Constitution, art. X, § 1.
[113] *Treacy v. Municipality of Anchorage*, 91 P.3d at 260.