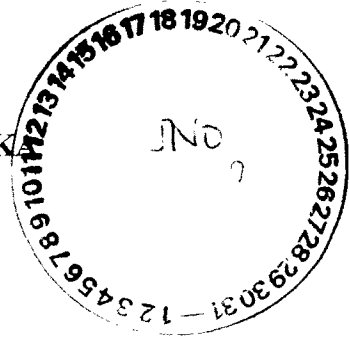


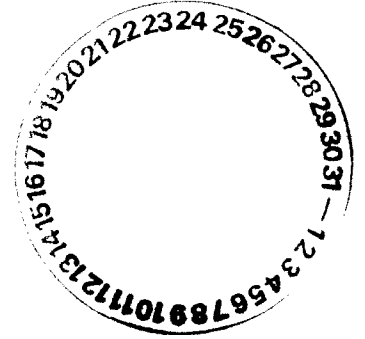
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IN THE SUPREME COURT OF THE STATE OF ALASKA



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.)

S13748



Superior Court Case No. 1JU-08-730 CI

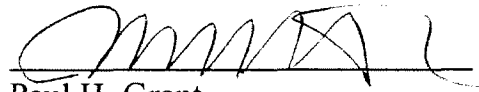
EXCERPT OF RECORD

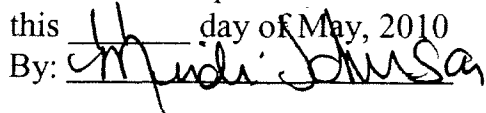
Volume 1 of 1

**APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, FIRST JUDICIAL DISTRICT,
JUDGE PHILIP M. PALLENGBERG**

Respectfully Submitted,
LAW OFFICE OF PAUL H. GRANT
217 Second Street, Suite 204
Juneau, Alaska 99801
(907) 586-2701

DATED: May 4th, 2010


Paul H. Grant
Attorneys for Appellant
Alaska Bar No. 7710124

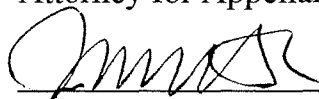
Filed in the Supreme Court
this 4th day of May, 2010
By: 

EXCERPT OF RECORD

	<u>Bates Stamp Page #</u> (Center Bottom Bate)
(1) CBJ Law Dept Memo John Hartle, 2/20/08	001-003
(2) Ordinance 2008-05(b), dated 3/10/08	004-010
(3) Complaint, 7/11/2008	011-016
(4) Answer, 8/4/2008	017-020
(5) Affidavit of Larry Paul, 2/4/2009	021-027
(6) Decision on Motions for Summary Judgment, 10/14/09	028-046
(7) Final Judgment, 12/11/2009	047-048

Dated May 4, 2010 at Juneau, Alaska.

Law Office of Paul H. Grant
Attorney for Appellant



Paul H. Grant
AK Bar No. 7710124





CBJ Law Department
MEMORANDUM

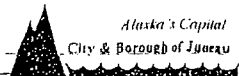
To: Mayor and Assembly
From: John W. Hartle, City Attorney *JH*
Subject: Ordinance 2008-05, Smoking Ban Amendments
Date: February 20, 2008

At its regular meeting on January 28, the Assembly directed me to prepare an ordinance to close any gaps in the current smoking ban ordinance so as to clearly prohibit smoking in all places where either alcoholic beverages or food are offered for sale. Ordinance 2008-05 attempts to do just that.

As the smoking ban ordinance was originally adopted, in October 2001, both bars and bar restaurants were exempted from the ban on smoking in public places. The Assembly amended the ordinance in June 2004 to extend the ban to bar restaurants effective on January 2, 2005, and to further extend the ban to bars effective on January 2, 2008.

As a result of issues that have arisen in the implementation of the January 2, 2008, extension of the ban to bars, we have identified some apparent gaps in the ordinance that have raised concerns about whether there is now a "level playing field" among impacted businesses. Specifically, the concern is with "private clubs" that sell alcoholic beverages or offer food for sale. For example, the Fraternal Order of the Eagles offers alcoholic beverages for sale under a "club license" issued by the State of Alaska. Businesses selling alcoholic beverages under a club license are not within the very narrow definition of a "bar" in the existing code. This has raised concerns among bar owners.

In addition, the limited exception to the smoking prohibition for "private functions" in CBJ 36.60.030(a)(6) is difficult to enforce as it was intended. Basically, all one of the listed places needs to do to take advantage of the exception is declare the enclosed area as in use for a "private function" and declare that admission to the function was determined at least three days in advance. Without expending considerable investigatory resources, such as the use of a search warrant, this type of argument would be difficult to refute in court.



001

February 20, 2008

Ordinance 2008-05 would close these arguable gaps. It would: (1) broaden the definition of a "bar" to include *any* type of liquor license other than restaurants; (2) eliminate the exception to the smoking prohibition for "private functions" in CBJ 36.60.030(a)(6); and (3) specifically prohibit smoking in private clubs that are licensed by the State to sell alcoholic beverages, or that offer food for sale, regardless of the number of employees.

I have also tried to simplify definitions and clarify the language throughout the ordinance. In preparing this ordinance, I reviewed similar ordinances from around the country, including the Municipality of Anchorage's second-hand smoke ordinance, which was substantially revised in July 2007.

Summary of amendments to prohibit smoking in all places where either alcoholic beverages or food are offered for sale:

At page 8, lines 21-23, the proposed ordinance deletes the exception for "private functions" in the existing code. Then, at page 6, lines 9-10, the ordinance prohibits smoking in "[p]rivate 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."

This is similar to how the Anchorage ordinance addresses this issue. Under the Anchorage Municipal Code, smoking is prohibited in any "private club" that is licensed to sell alcoholic beverages or that is a place of employment. AMC 16.65.030(A)(2). Ordinance 2008-05 does the same, and prohibits smoking in a private club that offers food for sale. This is to address the concern that existing restaurants might form "private clubs" which are essentially smoking rooms in restaurants.

Our research has shown that many cities have amended their smoking ban ordinances to eliminate exceptions, including "private club" exceptions. For instance, numerous cities in Massachusetts have prohibited smoking in private clubs, with no exceptions. That private club smoking ban was upheld by the Supreme Judicial Court of Massachusetts, the highest state court, as against constitutional and other challenges. *American Lithuanian Naturalization Club, Athol, Mass. Inc. v. Board of Health of Athol*, 844 N.E.2d 231 (Mass. 2006).

Additional policy matters for the Assembly's consideration:

(1) Exceptions for certain places of employment: The existing code provides two exceptions to the ban on smoking in places of employment: private residences used as a place of employment except when the private residence is open for use as a child care, adult care,

Mayor and Assembly
Re: Ordinance 2008-05

February 20, 2008

or health care facility; and places of employment with a total of four or fewer employees unless the place of employment is an "enclosed public place." CBJ 36.60.030 at page 8, lines 1-13 of Ordinance 2008-05.

Smoking ban ordinances in many other cities, including Anchorage, do not provide an exception for places of employment based on the number of employees; rather, they simply prohibit smoking in places of employment that are enclosed places.

Ordinance 2008-05 does not include an amendment to the "four or fewer employees" exception to the ban on smoking in places of employment, but I bring it to your attention in the event you wish to address this point. (Note that "employee" includes a person who works as a volunteer. Page 2, lines 9-12.)

Ordinance 2008-05 does, however, provide that for private clubs which sell alcoholic beverages or offer food for sale, there is no "four or fewer employees" exception, just as there is no such exception for places of employment that are "enclosed public places" (such as bars and restaurants). This is to ensure a "level playing field" in the competitive restaurant and bar economy.

(2) Outdoor seating areas of restaurants and bars: Ordinance 2008-05 extends the smoking ban to "outdoor seating areas" of bars, restaurants, and other places. Page 4, lines 13-17; and page 5, lines 4-6. This is a common provision in second-hand smoke ordinances, but it is an extension of the existing code.

(3) Retail tobacco stores: The ordinance also eliminates the exception for smoking in "retail tobacco stores." Page 8, line 17. I understand that one or more bars have established "retail tobacco stores" on their premises (essentially, smoking rooms). This change would eliminate that arguable loophole.

Please let me know if you have questions.

Presented by: The Manager
Introduced: 02/11/2008
Drafted by: J.W. Hartle

ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA

Serial No. 2008-05(b)

An Ordinance Renaming, Amending, and Extending the
Smoking in Public Places Code.

BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

Section 1. Classification. This ordinance is of a general and permanent nature and shall become a part of the City and Borough Code.

Section 2. Amendment of Chapter. CBJ 36.60. Smoking in Public Places, is renamed and amended to read:

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, gymnasias, 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.

"Smcking" 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.

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36.60.050 Other applicable laws.

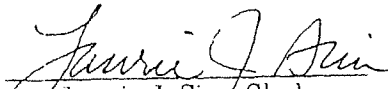
This chapter shall not be construed to permit smoking where it is otherwise restricted by other applicable laws.

Section 3. **Effective Date.** This ordinance shall be effective 30 days after its adoption.

Adopted this 10th day of March, 2008.


Bruce Botelho, Mayor

Attest:


Laurie J. Sica, Clerk

D. Ordinance 2007-21(AT)

An Ordinance Appropriating To The Manager The Sum Of \$2,550 As Funding For The Purchase Of Artworks For The Juneau-Douglas City Museum, Funding Provided By Museums Alaska, Incorporated.

This ordinance would appropriate a \$2,550 Museums Alaska, Inc., Art Initiative grant, for the purchase of artwork for the Juneau-Douglas City Museum's permanent collection.

I recommend this ordinance be adopted.

IX. UNFINISHED BUSINESS

A. Ordinance 2008-05(b)

An Ordinance Renaming, Amending, And Extending The Smoking In Public Places Code.

At its regular meeting on January 28, 2008 the Assembly directed the City Attorney to prepare an ordinance to close the claimed gaps in the current smoking ban ordinance to prohibit smoking in all places where either alcoholic beverages are sold, or food is offered for sale. As a result of the ban on smoking in bars, which became effective on January 2, 2008, some apparent gaps in the current ordinance have been identified, which have raised concerns about a "level playing field" among impacted businesses.

In short, this ordinance would: (1) broaden the definition of a "bar;" (2) eliminate the limited exception to the smoking prohibition for "private functions" in CBJ 36.60.030(a)(6), which is difficult to enforce and has limitations that can be circumvented; (3) specifically prohibit smoking in private clubs that are licensed by the State to sell alcoholic beverages, or that offer food for sale; and (4) eliminate the "retail tobacco store" exemption. The ordinance also simplifies several definitions and clarifies the language of the ordinance.

Version (b) incorporates the recommendations that came from the Committee of the Whole meeting of March 5, 2008. The only change in version b adds an exemption from the smoking ban for outdoor patios and seating areas. There is a memo from the City Attorney outlining the changes found in this version included in the packet.

I recommend this ordinance be adopted.

X. NEW BUSINESS

A. Pusich/Corrigan v Planning Commission Appeal

On February 12, 2008, the Planning Commission approved three Conditional Use Permits for development of a cottage housing project located on property known as Heritage Hills Subdivision Lots 1 - 4. On March 3, 2008, Kelly Corrigan and Mary Kay Pusich filed an appeal of the decision to the Assembly. The Notice of Appeal is in the packet. The Assembly is the appeal agency for this appeal, and its actions throughout the appeal process are governed by CBJ 01.50, the Appellate Code. The Code requires that upon receiving an appeal, the Assembly must first decide whether to accept or reject it.

FILED
CLERK OF ALASKA
COURTS

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

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COURTS

FRATERNAL ORDER OF EAGLES,)
JUNEAU-DOUGLAS AERIE 4200,)
MARK PAGE, BRIAN TURNER,)
R.D. TRUAX, and LARRY PAUL,)

BY EL DEPUTY

Plaintiffs,

vs.

CITY & BOROUGH OF JUNEAU,)

Case No. 1JU-08- 730 CI

Defendants.)

COMPLAINT

Come now the Plaintiffs Fraternal Order of Eagles, Juneau-Douglas Aerie 4200; Mark Page; Brian Turner, R.D. Truax; and Larry Paul; and for their complaint against the Defendant City and Borough of Juneau allege as follows:

1. The Fraternal Order of Eagles is an international private fraternal organization which was founded in 1898. The local chapters of the national organization are known as "Aeries" (the Juneau-Douglas branch will be referred to as "Aerie 4200" or "Eagles"). Aerie 4200 is an Alaska not-for-profit corporation in good standing which is fully qualified to maintain this action on behalf of itself and its members.
2. Brian Turner, Mark Page, R.D. Truax, and Larry Paul are individual members and officers of Aerie 4200 who sue to vindicate their individual constitutional rights.

217 f St., Suite 204
Juneau, Alaska 99801
Tele: (907) 586-2701
Fax: (907) 586-8059

- 1
- 2 3. Defendant City and Borough of Juneau ("CBJ") is an Alaska municipal
- 3 corporation.
- 4
- 5 4. The Fraternal Order of Eagles is a private club with an extremely restrictive
- 6 membership policy. Only a small number of members are admitted each year
- 7 Applicants' qualifications for admission to membership are checked carefully.
- 8 New applicants must be approved by a majority vote of the members.
- 9 Members are either full members of the Aerie (men or women) or members of
- 10 the "Auxiliary" (women only). Currently Aerie 4200 has approximately 252
- 11 Aerie members and 122 Auxiliary members. Aerie 4200 is governed under a
- 12 system of direct democracy. Policies concerning conduct in the Aerie Home
- 13 are set by the members at regular meetings. The policies are carried out by a
- 14 board of trustees which is elected by the Aerie. There is a complex set of due
- 15 process procedures by which members can be excluded from the Home or
- 16 removed from membership for infractions of the rules in the Home.
- 17
- 18
- 19 5. Currently the democratically adopted house rules for the Aerie Home permit
- 20 members to smoke in club premises during members-only events. This policy
- 21 was adopted at an Aerie meeting on March 11, 2008 by a unanimous vote.
- 22
- 23 6. Members in the Aerie are selected on the basis of, and are bound together by,
- 24 many common beliefs, practices and rituals. Among the commonalities that
- 25 bind Eagle members together are a religious belief in a Supreme being; a belief
- 26 and practice that the Aerie is an extension of the members' homes; fundraising
- 27 events which further the charitable works and contributions of the Aerie;
- 28

1 patriotic allegiance to the flags and constitutions of Alaska and the United
2 States of America; and other strongly held core personal beliefs. The club's
3 rituals and meetings are off limits to non-members.
4

- 5 7. The premises of the Aerie Home are not open to the public. Admission is
6 through a locked pass-code doorway, to which only members have access.
7 Under limited circumstances members may bring guests into the Aerie.
8
- 9 8. The City and Borough of Juneau has adopted a municipal ordinance, CBJ
10 36.60.005 *et. seq.* which purports to ban smoking in private clubs, including
11 Aerie 4200.
12

13 Count I

- 14 9. The members of Aerie 4200 have a constitutionally protected right to establish
15 the rules and regulations under which they choose to associate with each other
16 in the Aerie Home. They are constitutionally entitled to determine for
17 themselves whether or not to engage in any lawful activity, including smoking,
18 within the premises of their private club.
19
- 20 10. CBJ 36.60.005 *et. seq.*, to the extent that it purports to ban smoking in the
21 private premises of the Aerie Home, violates the rights of the club and its
22 members to free association and expression under the United States and Alaska
23 Constitutions.
24

25 Count II

- 26 11. The members of Aerie 4200 have a constitutionally protected privacy interest
27 which prohibits the government from dictating or intruding into their decisions
28

1 about what lawful activities may take place inside the private setting of the
2 Aerie Home.
3

4 12. By purporting to ban smoking in private clubs, and by enforcing the ban
5 against Aerie 4200, the CBJ has violated the privacy rights of the club and its
6 members as established under the United States and Alaska constitutions.
7

8 **Count III**

9 13. The State of Alaska, in Title 4 of the Alaska Statutes, has enacted a
10 comprehensive scheme for the regulation of alcoholic beverages. It has also
11 established a comprehensive scheme for regulating smoking in AS 18.35.300
12 *et.seq.* The legislative history of the CBJ smoking ban shows that it was
13 intended to serve as a regulation of tobacco use within establishments which
14 serve food and alcoholic beverages.
15

16 14. The comprehensive state schemes for regulating alcohol and tobacco preempt
17 the CBJ's attempts to regulate the same subjects by initiating a ban against
18 smoking in private clubs such as Aerie 4200.
19

20 **Count IV**

21 15. The CBJ police have unlawfully intruded into the privacy of the Aerie Home
22 to issue citations to members who were exercising their constitutional right to
23 engage in private activities, including smoking. On information and belief, the
24 CBJ will continue its unlawful efforts to obtain entry into the privacy of the
25 Aerie Home and to enforce the invalid provisions of CBJ 36.60.005 *et.seq.*
26
27
28

1 These police intrusions into the Aerie Home inflict irreparable injury on the
2 Eagles and its members for which there is no adequate remedy at law.

3
4 16. Under the circumstances of this case, the Eagles are entitled to a preliminary
5 and permanent injunction prohibiting the CBJ from attempting to enforce CBJ
6 36.60.005 *et.seq.* within the premises of Aerie 4200.
7

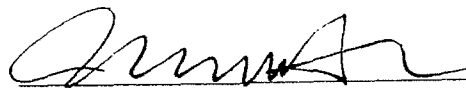
8 **Prayer for Relief**

9 Plaintiff prays for judgment against the Defendants as follows:

- 10 1. For a declaratory judgment finding that the portion of CBJ 36.60.005
11 *et.seq.* which bans smoking in private clubs is unconstitutional both on its
12 face and as applied to Aerie 4200 and its members.
13
14 2. For a preliminary and permanent injunction prohibiting the CBJ from
15 attempting to enforce CBJ 36.60.005 *et.seq.* in the Aerie Home.
16
17 3. For an award of costs and attorney fees.
18
19 4. For such other relief as the court may find proper under the facts of
20 the case.

21 DATED this 11th day of July, 2008 at Juneau, Alaska.

22 LAW OFFICES OF PAUL H. GRANT

23 

24 Paul H. Grant, Bar No. 7710124
25
26
27
28

ATTORNEY AT LAW

217 1/2 St., Suite 204
Juneau, Alaska 99801
Tele: (907) 586-2701
Fax: (907) 586-8059

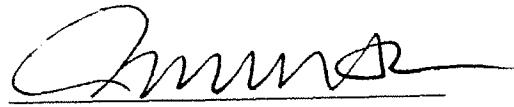
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CERTIFICATION

I HEREBY CERTIFY that on 11th day of July, 2008, a true and correct copy of the foregoing was mailed by Certified mail Return Receipt Requested to:

John Hartle
CBJ Municipal Attorney
155 S. Seward St.
Juneau, AK 99801

Laurie Sica
CBJ Municipal Clerk
155 S. Seward St.
Juneau, AK 99801



Paul H. Grant

THIS MATTER IS FORMALLY
ASSIGNED TO
PATRICIA A. COLLINS
SUPERIOR COURT JUDGE

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 FRATERNAL ORDER OF EAGLES,
4 JUNEAU-DOUGLAS AERIE 4200,
5 MARK PAGE, BRIAN TURNER,
6 R.D. TRUAX, and LARRY PAUL,

7 Plaintiffs,

8 v.

9 CITY AND BOROUGH OF JUNEAU,
10 a municipal corporation,

11 Defendant.

Case No: 1JU-08-0730 CI

FILED
STATE OF ALASKA
CLERK OF SUPERIOR COURT
08 AUG -4 PM 3:57
BY 67 DEPUTY

12 ANSWER

13 COMES NOW DEFENDANT, the City and Borough of Juneau, ("CBJ"), a Home Rule
14 Municipality organized pursuant to the laws and Constitution of the State of Alaska, through
15 counsel, City Attorney John W. Hartle, and in answer to Plaintiffs' Complaint, admits, denies,
16 and alleges as follows:

- 17 1. Defendant lacks knowledge or information sufficient to form a belief as to the
18 allegations in Paragraph 1 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.
- 19 2. Defendant lacks knowledge or information sufficient to form a belief as to the
20 allegations in Paragraph 2 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.
- 21 3. Admitted.
- 22 4. Defendant lacks knowledge or information sufficient to form a belief as to the
23 allegations in Paragraph 4 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.
- 24 5. Defendant lacks knowledge or information sufficient to form a belief as to the
25 allegations in Paragraph 5 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.

155 South Seward Street, Juneau, Alaska 99801
voice: 907-586-5242 fax: 586-1147
City & Borough Attorney
City & Borough of Juneau, Alaska

City & Borough Attorney
Borough of Juneau, Alaska
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1 6. Defendant lacks knowledge or information sufficient to form a belief as to the
2 allegations in Paragraph 6 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.

3 7. Defendant lacks knowledge or information sufficient to form a belief as to the
4 allegations in Paragraph 7 of Plaintiffs' Complaint, and, accordingly, such allegations are denied.

5 8. Admitted.

6 **Count I**

7 9. The allegations of Paragraph 9 of Plaintiffs' Complaint are assertions of law which
8 require neither admitting nor denying, and, accordingly, are denied.

9 10. The allegations of Paragraph 10 of Plaintiffs' Complaint are assertions of law
10 which require neither admitting nor denying, and, accordingly, are denied.

11 **Count II**

12 11. The allegations of Paragraph 11 of Plaintiffs' Complaint are assertions of law
13 which require neither admitting nor denying, and, accordingly, are denied.

14 12. The allegations of Paragraph 12 of Plaintiffs' Complaint are assertions of law
15 which require neither admitting nor denying, and, accordingly, are denied.

16 **Count III**

17 13. The allegations of Paragraph 13 of Plaintiffs' Complaint are assertions of law
18 which require neither admitting nor denying, and, accordingly, are denied.

19 14. The allegations of Paragraph 14 of Plaintiffs' Complaint are assertions of law
20 which require neither admitting nor denying, and, accordingly, are denied.

21 **Count IV**

22 15. Denied.

23 16. The allegations of Paragraph 16 of Plaintiffs' Complaint are assertions of law
24 which require neither admitting nor denying, and, accordingly, are denied.

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AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a cause of action upon which relief may be granted.

2. Plaintiffs' claims for injunctive relief are barred because Plaintiffs have failed to allege or prove irreparable harm.

3. Plaintiffs' claims for injunctive relief are barred because Plaintiffs are seeking such relief without offering to protect Defendant's interests as required by law.

4. Plaintiffs' claims for injunctive relief are barred because Plaintiffs have failed to raise serious and substantial questions going to the merits of the case.

5. Plaintiffs' claims for equitable relief are barred by the doctrine of "unclean hands" because Plaintiffs are intentionally violating a law which they know to be applicable.

6. Plaintiff Fraternal Order of Eagles, Juneau-Douglas Aerie 4200, as a business entity, is not entitled to the Constitutional rights asserted in Plaintiffs' Complaint.

7. Plaintiffs' claim for declaratory relief is barred because municipal ordinances in Alaska are presumed constitutional and in this instance are proper in all respects as a matter of law.

8. Defendant reserves the right to add such additional defenses as may be revealed in discovery.


WHEREFORE, Defendant asks this court to

- 1. Dismiss Plaintiffs' Complaint, and order that Plaintiffs take nothing thereby.
- 2. Award Defendant its costs and reasonable attorney's fees as allowed by law.
- 3. Grant such additional relief as the Court deems just and equitable.

City & Borough Attorney
City & Borough of Juneau, Alaska
155 South Seward Street, Juneau, Alaska 99801
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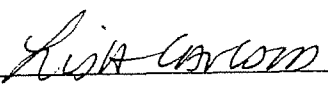
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2 DATED this 4th day of August, 2008.

3 CITY AND BOROUGH OF JUNEAU

4
5 By: 
6 John W. Hartle
7 City Attorney
8 Attorney for Defendant
9 Alaska Bar No. 9112116

10 CERTIFICATE OF SERVICE

11 I hereby certify that a copy of the foregoing Answer was served via U.S. Mail on Paul H.
12 Grant, Attorney at Law, 217 Second Street, Suite 204, Juneau, Alaska 99801, this 4th day
13 of August, 2008.

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City & Borough Attorney
City & Borough of Juneau, Alaska
155 South Seward Street, Juneau, Alaska 99801
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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

FEB -4 PM 4:16

CLERK, TRIAL COURTS

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

BY BS DEPUTY

Plaintiff,)

v.)

City and Borough of Juneau,)

Case No. 1JU-08-730 CI

Defendant(s).)
_____)

AFFIDAVIT OF LARRY PAUL

LARRY PAUL testifies as follows:

(1) I was the Grand Worthy President of Aerie 4200 of the Fraternal Order of Eagles ("F.O.E.") from April of 2007 to April of 2008. The Grand Worthy President presides over ceremonial events and meetings of the Aerie. I was President when the current House Rules (which permit smoking in the club) were adopted.

(2) The rituals and operations of the Fraternal Order of Eagles are controlled by a detailed set of policies entitled "The Official Ritual of the Local Aeries, Fraternal Order of Eagles" ("the Ritual"). The Ritual is issued by the Grand Aerie, which is the international governing body of the Fraternal Order of Eagles. That document sets out in great detail the procedures to be followed by all local Aeries, controlling membership practices, dues, guests, meeting rituals,

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elections, governance, and so forth. In addition to the written Official Ritual, some observances are not written but are passed down from President to President and member to member. This includes various signs and signals related to greeting other members and to the conduct of meetings. In my experience Aerie 4200 is very faithful to the Ritual.

(3) In many ways the Ritual is the equivalent of a church liturgy, in that it is a strictly prescribed set of observances which bind the members together in fellowship. The Ritual has in common with church practice the fact that members in the Eagles must believe in a Supreme Being, and the Ritual reflects that belief. There is also a strong component of patriotism and of an obligation to render service to the community. The Ritual differs from church liturgy, however, in that it is only intended for members of the Aerie, and is only performed in the Aerie Home. The public is not allowed to observe the ritual, as they are in many churches.

(4) There are sets of Articles and Bylaws, both state and local, which set out the legal duties of officers and trustees. Aerie 4200 is incorporated as a not-for-profit charitable corporation under the laws of Alaska. Our activities are intended to produce a financial base from which we make contributions each year to various worthy causes that we support. For instance in 2007 we contributed in excess of \$24,686 to various charities. Among these were Special Olympics, college scholarship funds, Southeast Alaska Independent Living (SAIL), and

1 many others. We also donate to individual members who go through difficult
2 times, such as illness or family tragedies. In 2008 (following the adoption of the
3 ordinance) we were only able to contribute \$16,203 to our various causes, this
4 year including the new playground at Twin Lakes. Since the adoption of the CBJ
5 smoking ordinance revenues in the club have decreased 25%. Some of this is
6 probably due to external economic influences, while some may be due to
7 decreased member use of the club because of the smoking ban. Whatever the
8 cause, this will negatively impact our ability to carry out our charitable mission in
9 2009 and beyond.

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13 (5) One of the facets of the Ritual is a requirement that the Aerie (which
14 means "the Nest") be treated as an extension of the members' homes. It is
15 expected that members will maintain privacy about things that occur in the Aerie
16 Home, just as they would in their own home. This expectation is stated in the
17 Official Ritual, the House Rules, and in the unwritten rituals that bind members
18 together. The privilege of inviting guests is jealously guarded, just as it is in the
19 members' own homes. Guests are not permitted to participate in or observe any of
20 the Ritual, which is reserved for members only. I will discuss the guest policy for
21 social visitors in more detail below.
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24 (6) There are four times per year when we are permitted to have fund
25 raising events for our charitable causes. When we open up the Aerie to the public
26 for the fundraising events, we do not allow smoking.
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(7) Membership is divided into full Aerie members and Ladies' Auxiliary members. Currently there are 262 full Aerie members and 134 Ladies' Auxiliary members. Of these, there are approximately 46 people who provide the main base of support for Aerie 4200. The Aerie has had no new member applications since November, which is highly unusual. We attribute this in part to the fact that smokers (who make up about 85% of the members) no longer feel welcome in the Aerie Home. The cost of membership is \$50 to join (\$35 plus a \$15 initiation fee) and \$35 per year after that.

(8) New membership applications must be approved by unanimous vote of the Aerie members. Applicants are required to be of good character, committed to the objectives and rituals of the Order, profess belief in a Supreme Being, and not have been expelled from any other organization. Any application for membership can be vetoed ("blackballed") by a single Aerie member. There is also a tribunal and a complex set of procedures for disciplining members who violate the rules or rituals of the F.O.E. New members are installed according to a strictly prescribed set of rituals conducted by the Worthy President and other officers at a secret meeting. The induction ceremony (like most of the rituals) includes proper identification of members present; presentation of credentials; proper placement of the alter, flags, and other regalia; proper placement and movements of the participants; use of correct signs, gestures and terminology; and recitation of the words of observance precisely as set out in the Official Ritual.

1
2 (9) The policies and procedures of the local Aerie are controlled by the
3 Trustees and ultimately the membership, while day to day operations are
4 controlled by the Business Manager. The Business Manager is required to be a
5 member of the Eagles, which means he or she subscribes to the club rules. The
6 business manager is one of the club bartenders, as well. In addition to the business
7 manager (that position is currently vacant) there are currently four other part-time
8 bartenders. They are required to be members of the club and are required to accept
9 the club rules as a condition of their employment. All of them are smokers and are
10 allowed under club rules to smoke while on duty. The current CBJ ordinance
11 deprives them of a benefit of employment (the ability to smoke during work) by
12 requiring them to stop work to go outside to have a cigarette.
13

14
15 (10) The current House Rules were proposed by the Trustees and adopted
16 by the full Aerie membership in April of 2008. Prior to that time, the rules did not
17 address smoking since it was not an issue, and we never imagined it could become
18 an issue because we assumed government would respect our privacy. The current
19 "smoking permitted" policy was adopted in response to the CBJ's Orwellian
20 attempt to control what goes on inside of our private club. It was passed
21 unanimously by the 46 members present and voting at the meeting.
22
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24 (11) The policy for inviting guests into the Aerie Home is that they must
25 be sponsored by a member who is present. The number of times that a guest can
26 visit is three; after that they are expected to apply for membership. All guests are
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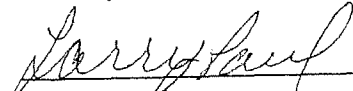
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Juneau, Alaska 99801
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1 signed into the Aerie Home's guestbook. Strictly speaking, guests should be
2 admitted if they are previously known to a member who is on the premises. In
3 certain instances this rule was relaxed somewhat to allow for providing assistance
4 to people in distress or allowing prospective members to evaluate the club.
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7 (12) Since passage of the CBJ's no smoking ordinance the Aerie Home has
8 twice been invaded by police authorities seeking entrance under false pretenses for
9 the purpose of catching us in violation of this unconstitutional ordinance. In one
10 instance troopers lied to a member, telling him that their boat was in the repair
11 shop and asking if they could wait in the Aerie until repairs were finished. They
12 were signed in as guests of the member. In another instance the investigator lied
13 by claiming to be a retired veteran and member of the Veterans of Foreign Wars.
14 According to his made-up story, since there is no VFW post in Juneau he falsely
15 claimed that he was considering joining the Eagles. A member who respects and
16 honors veterans was bamboozled into allowing entry. In both instances, Aerie
17 members were induced under false pretenses to extend the hospitality of the Aerie
18 Home. It is a sad day when the authorities feel justified in lying and cheating as
19 the only way to get into our private club to issue citations and fines to people who
20 want nothing more than to be afforded their privacy. It is equally sad that because
21 of governmental abuse, we can no longer offer the hand of friendship to people
22 who come to our door in distress, for fear that they are police officers lying their
23 way into the facility.
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1 (13) Aerie 4200 of the Fraternal Order of Eagles is, by design and practice,
2 a private extension of the members' homes. Anyone who joins is required to
3 acknowledge and abide by the House Rules. Those rules allow members to smoke
4 in the club. We would not presume to tell Assembly members or anyone else what
5 they can and cannot do in the privacy of their own homes. We believe it is an
6 equally egregious violation of our rights for the CBJ to try to tell our members
7 what they can or can't do in the Aerie Home.
8
9

10 DATED this 4TH day of February, 2009, Juneau, Alaska.

11 
12 Larry Paul

13
14 SUBSCRIBED AND SWORN TO before me this 4th day of February,
15 2009 at Juneau, Alaska.


16 
17 Notary in and for the State of Alaska
18 My Commission Expires: 2/1/12

19 **CERTIFICATION**

20 I HEREBY CERTIFY that on February 4th, 2009, a true and correct copy
21 of the foregoing was mailed to:

22 John Hartle, City Attorney
23 City and Borough of Juneau
24 155 S. Seward St.
25 Juneau, AK 99801

26 *and Peter Maaser, Argalben Maaser & Fitzgerald.*

27 
28 Paul H. Grant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

FRATERNAL ORDER OF EAGLES,
JUNEAU DOUGLAS AERIE 4200, MARK
PAGE, BRIAN TURNER, R.D. TRUAX, and
LARRY PAUL,

Plaintiffs,

v.

CITY AND BOROUGH OF JUNEAU,

Defendant.

FILED IN CHAMBERS
STATE OF ALASKA
FIRST JUDICIAL DISTRICT
AT JUNEAU
By KJK Date 10.14.09

Case No. 1JU-08-730 CI

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant City & Borough of Juneau ("CBJ") has enacted a series of increasingly restrictive anti-smoking ordinances. The most recent of these, Ordinance 2008-05(b), was enacted on March 10, 2008. This ordinance extended Juneau's earlier smoking ordinances to ban smoking in private clubs that sell alcohol or food.

The Fraternal Order of Eagles, Juneau-Douglas Aerie 4200 and three of its members (hereinafter collectively referred to as the Eagles) challenge the application of this ordinance to the Eagles club. They raise a variety of claims, including freedom of association under the United States and Alaska constitutions, the right to privacy under the United States and Alaska constitutions, preemption by State law regulating tobacco and alcohol, and illegal "intrusion" by CBJ police into the Eagles' Aerie Home.

The Eagles have moved for summary judgment on the issues of freedom of association under the First Amendment to the United States Constitution and the right to privacy under

article I, section 22 of the Alaska constitution. They support their motion with an affidavit from Larry Paul, the former “Grand Worthy President” of the Juneau Eagles. The CBJ opposed their motion and cross-moved for summary judgment. CBJ does not dispute the facts set out in Mr. Paul’s affidavit, but contends that it is entitled to judgment as a matter of law.

The parties are in agreement that there are no genuine issues of material fact. Both parties contend that the undisputed facts entitle them to judgment as a matter of law. The court has considered the parties’ memoranda and the memorandum of *amicus curiae* the American Cancer Society, and issues the following decision.

II. DISCUSSION

A. Powers of Home Rule Municipalities

The Alaska Constitution gives broad law-making power to home rule municipalities.¹ Article X, section 11 provides that a “home rule borough or city may exercise all legislative powers not prohibited by law or by charter.” Furthermore, article X, section 1 provides that “a liberal construction shall be given to the powers of local government units.”

A duly enacted municipal ordinance is presumed to be constitutional and will be construed, to the extent possible, to avoid a finding of unconstitutionality.²

¹ *Municipality of Anchorage v. Afualo*, 657 P.2d 407, 408 (Alaska App. 1983); *Municipality of Anchorage v. Richards*, 654 P.2d 797, 798 (Alaska App. 1982); *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1199-1200 (Alaska App. 1981); *City of Kodiak v. Jackson*, 584 P.2d 1130, 1132 (Alaska 1978).

² *Hagblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 259 (Alaska 2004).

B. *Freedom of Association*

The plaintiffs' first claim is that application of the smoking ordinance to the Eagles infringes upon their right to freedom of association under the First Amendment. Other courts have uniformly rejected similar claims.³

Plaintiffs point instead to a series of cases involving the question of whether application of anti-discrimination laws to private clubs infringes upon freedom of association. These cases, though, involve regulation of the membership of private clubs, as distinguished from regulation of the conduct of members.⁴ 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.

One could not seriously argue that application of other penal laws, such as the laws against drug possession, theft, sexual contact with minors, or prostitution, to the conduct of members within the confines of a private club infringes upon the members' freedom of association. All such laws regulate the actions of the members, not their choice of the people with whom they associate. In terms of its impact on freedom of association, regulation of smoking as an activity is not different in kind from regulation of these other activities. One can certainly debate the appropriateness of smoking regulation as a policy matter. But once the

³ *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*, 371 F. Supp. 2d 522 (S.D.N.Y. 2005); *American Legion Post No. 149 v. Washington State Dept. of Health*, 192 P.3d 306 (Wash. 2008); *City of Tucson v. Grezaffi*, 23 P.13d 675 (Az. App. 2001); *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844 (N.D. Ohio 2004).

⁴ *See, Board of Directors of Rotary, Intl. v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Louisiana Debating and Literary Association v. The City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995); *cert. denied* 515 U.S. 1145; *Chi Iota Colony, Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 147 (2nd Cir. 2007).

CBJ Assembly made the policy choice to regulate smoking in places that include private clubs, this is a regulation on people's conduct in those places, not of their freedom to associate with whomever they wish. People are free to join the Eagles or not; they are just prohibited from smoking inside the club.

This is the distinction made in other cases upholding application of smoking bans to private clubs. For instance, in *The Players, Inc. v. City of New York, et al*, the court rejected the claim that regulation of the conduct of smoking in the club infringed upon the members' freedom of association:

[T]he right to associate is only implicated where government intrudes into a person's choice to 'enter into and maintain certain intimate human relationships,' or where 'governmental action interferes with an organization engaged in activities protected by the First Amendment, such as speech, assembly, redress of grievances, and the exercise of religion.'

Players cannot argue that the rights of its members to enter into intimate human relationships, which are defined by 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life,' are infringed by the Smoking Bans. The allegations contained in Players' Amended Complaint suggest that Players might be able to demonstrate through further factfinding that, through joining the club, its members enter into intimate human relationships deserving of constitutional protection. . . .

But . . . the Court finds that the club could not demonstrate that any such right was infringed by the Smoking Bans. Players does not cite to, and the Court cannot locate, any provision of the Smoking Bans or their regulatory schemes that purports to regulate membership, or interaction among members, in any clubs covered by the statutes. Smokers' ability to join Players is completely unaffected by the Smoking Bans. At worst, interaction among members could be affected by the laws only incidentally.

Players, for example, claims that its mission is to 'promote social intercourse amongst actors, writers and artists by providing its members with a relaxed and intimate meeting place for them to drink, eat, play billiards, perform and attend various live plays and performances, and smoke.' It is difficult to see how the social intercourse, and social intimacy, that the club seeks to facilitate

could be unconstitutionally infringed merely because the meeting place provided by the club can no longer allow indoor smoking, even if it is still available for the full range of other social and recreational activities the club provides. To conclude otherwise 'would be to embellish the First Amendment with extra-constitutional protection for any ancillary practice adherents 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.'⁵

In *NYC CLASH, Inc. v. City of New York*, the court rejected what it termed an "association plus" theory, under which freedom of association would protect not only the choice of whom to associate with, but also the choice of what activities to engage in while associating:

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.

Similar to the New York district court's rejection in *CLASH* of an "association plus" theory, the Supreme Court has rejected a "religion plus" standard in freedom of religion cases. In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, the Court held that application of criminal laws prohibiting peyote to sacramental use of the drug during services

⁵ 371 F. Supp. 3d at 544-545, quoting from *Roberts v. United States Jaycees*, 468 U.S. 609, 617-19 (1984) and *NYC CLASH, Inc. v. City of New York*, 315 F. Supp.2d 461, 474 (S.D.N.Y. 2004) [internal citations omitted].

of the Native American Church did not violate the First Amendment.⁶ Because the laws prohibiting peyote were not directed to religious practice, but instead applied to all, prohibition of that conduct within the confines of the church did not violate the First Amendment. In both cases, the First Amendment protects freedom of association or religion, but it does not protect ancillary conduct carried out during observance of that freedom against prohibition by laws of general applicability.

An exception to this idea is regulation of constitutionally protected activities within a private club. Examples of this are religious activities, *see, e.g., Vietnamese Buddhist Study Temple in America v. City of Garden Grove*,⁷ or expressive activities, *see, e.g., Redner v. Dean*.⁸ It is clear that smoking tobacco is not a constitutionally protected activity under the United States constitution.⁹

The Eagles' argument here is also, essentially, "association plus". They contend that, because they wish to smoke with other Eagles members at the "Aerie Home", freedom of association includes not only the right to associate there, but also the right to smoke with their fellow members while they are associating. Like the court in *Players*, I am not convinced that freedom of association extends this far. I therefore do not find that this ordinance infringes upon Eagles members' constitutionally protected freedom of association.

⁶ 494 U.S. 872 (1990); *abrogated in part by statute, see e.g., Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127 (5th Cir. 2009).

⁷ 460 F. Supp. 2d 1165 (C.D. Cal. 2006) (dancing).

⁸ 29 F.3d 1495 (11th Cir. 1994).

⁹ This is not intended to address the question of privacy under the Alaska constitution which will be discussed below.

In light of this conclusion, it is not necessary to decide whether the Eagles club is an “intimate association” or not. Whether or not the club is an intimate association, this ordinance does not infringe upon its members’ right to associate with whomever they choose.

C. Privacy

Plaintiffs’ second argument is that the smoking ban, as applied to the Eagles, violates their right to privacy under article I, section 22 of the Alaska constitution. This is a closer question than their freedom of association claims.

Article I, section 22 of the Alaska constitution provides that “the right of the people to privacy is recognized and shall not be infringed.” This provision was adopted as a constitutional amendment by a vote of the people in 1972. The Alaska Supreme Court has held that the right to privacy under this provision is broader in scope than the implied right of privacy in the United States Constitution.¹⁰

Plaintiffs argue that the CBJ’s ban on indoor smoking in private clubs violates Alaska’s constitutional right to privacy. In analyzing a law against a challenge under article I, section 22, the court must begin by determining the level of scrutiny to be applied. This depends upon whether the right infringed upon is a fundamental right:

Under our case law, we begin our analysis in cases such as the one at hand by measuring the weight and depth of the individual right at stake so as to determine the proper level of scrutiny with which to review the challenged legislation. If this individual right proves to be fundamental, we must then review the challenged legislation strictly, allowing the law to survive only if the State can establish that it advances a compelling state interest using the least restrictive means available. In cases involving the right to privacy, the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is determined, at least

¹⁰ *State v. Planned Parenthood*, 171 P.3d 577, 581 (Alaska 2007), *citing Ravin v. State*, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J., concurring).

in part, by the relative weight of the competing rights and interests. As we have previously explained, 'the rights to privacy and liberty are neither absolute nor comprehensive . . . [and] their limits depend on a balance of interests.'¹¹

So if the right involved is fundamental, the court must apply strict scrutiny. On the other hand, when the individual right involved is not found to be fundamental, "a less stringent test is ordinarily applied."¹² Under this test,

To justify interference with non-fundamental aspects of privacy and liberty, the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest.¹³

So the first question the court must decide is whether there is a fundamental right to smoke tobacco in a private club like the Fraternal Order of Eagles.

The Alaska Supreme Court has found that there is a fundamental privacy right in two broad areas: activities conducted in the home, and activities infringing upon "personal autonomy."

The first of those – the home – was the subject of *Ravin v. State*, in which the court held that article I, section 22 protects possession of small quantities of marijuana in the home for personal use.¹⁴ After explicitly rejecting the claim that there is a fundamental right, under either the Alaska or United States constitutions, to use or possess marijuana, the *Ravin* court discussed the sanctity of the home. While the court indicated in an earlier case that article I, section 22, "shields the ingestion of food, beverages or other substances,"¹⁵ that right is not

¹¹ *State v. Planned Parenthood*, 171 P.3d at 581 [footnotes omitted], quoting *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

¹² *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

¹³ *Id.*; *Ravin v. State*, 537 P.2d at 497-98, 511.

¹⁴ 537 P.2d 494 (Alaska 1975).

¹⁵ *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974).

absolute and it may be subordinated to public health and welfare measures.¹⁶ However, the court in *Ravin* found that there is a fundamental right to “privacy in the home” which shifts the balance in favor of the individual’s right to privacy.¹⁷ Based on “the distinctive nature of the home as a place where the individual’s privacy receives special protection,” the court found that article I, section 22, protects possession of small amounts of marijuana in the home for personal use unless the state can show “a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.”¹⁸

The trial court in *Ravin* heard evidence from a number of expert witnesses about “various medical and social aspects of marijuana use.”¹⁹ The court found that the evidence was inconclusive:

It appears that there is no firm evidence that marijuana, as presently used in this country, is generally a danger to the user or to others. But neither is there conclusive evidence to the effect that it is harmless.²⁰

The court considered a number of cases, from Alaska and elsewhere, dealing with limitations on the power of the state “to protect the individual from his own folly”, and arrived at a general rule:

We glean from these cases the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he

¹⁶ *Id.*; *Ravin*, 537 P.2d at 503.

¹⁷ *Id.*

¹⁸ *Id.* at 504.

¹⁹ *Id.* at 505.

²⁰ *Id.* at 508.

pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.²¹

Because the state had not shown that use of small amounts of marijuana by individuals at home caused harm to the public health or welfare, the court found that the state had not justified the “the state’s intrusion into the citizen’s right to privacy” that would result from prohibition of personal consumption of marijuana by adults at home.²²

It is clear from a careful review of the *Ravin* opinion that it rests primarily upon the sanctity of the home. Based on the “relative harmlessness” of marijuana, the court found that the right to privacy in the home outweighs the state’s interest in regulating use of small amounts of marijuana in homes.²³ While the Supreme Court has never expressly extended *Ravin* to other activities conducted in the home, it has suggested the law may protect social gambling, in small amounts, in the home.²⁴ These cases establish neither a right to gamble nor a right to smoke.

Even in the home, the court has not granted privacy protection to use of substances which do not have the same “relative harmlessness” as marijuana. In *State v. Erickson*, the Supreme Court noted two limitations on the privacy right set out in *Ravin*:

We do not mean by this that a person may do anything at anytime as long as the activity takes place within a person’s home. There are two important limitations on this facet of the right to privacy. First, we agree with the Supreme Court of the United States, which has strictly limited the *Stanley*²⁵ guarantee to possession [of pornography] for purely private, non-commercial use in the home.

²¹ *Id.* at 509.

²² *Id.* at 511.

²³ *See, State v. Erickson*, 574 P.2d 1 (Alaska 1978).

²⁴ *McKenzie v. Municipality of Anchorage*, 631 P.2d 514, 517 (Alaska 1981) (“It may be that the municipality cannot constitutionally regulate gambling activities such as a small social bet in the privacy of one’s home.”)

²⁵ *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

And secondly, we think this right 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.²⁶

The court in *Erickson* rejected a *Ravin* challenge to Alaska's cocaine laws under the second limitation: the court concluded that cocaine poses a substantially greater threat to public health and welfare than does marijuana.²⁷ In particular, cocaine can cause death in users, and it can cause "acute psychological effects, acute physical effects, chronic psychological effects, chronic physical effects, crime and violence, loss of psychomotor control and an economic and social burden on society."²⁸ In short, cocaine has "a substantial potential for harm", which justifies prohibition of use of cocaine, even in the home.²⁹

Similarly in *Harrison v. State* the Alaska Court of Appeals refused to extend privacy protection under *Ravin* to possession of alcohol in the home.³⁰ *Harrison* involved a challenge under *Ravin* to Alaska's local option law. The court found that the evidence "unmistakably established a correlation between alcohol consumption and poor health, death, family violence, child abuse, and crime."³¹ Furthermore, the court found that the evidence showed that alcohol is more dangerous than marijuana.³² Based on the evidence presented, the court found that the state had met its burden of showing that the local option law – even when applied to possession of alcohol in the home – "bears a close and substantial relationship to the legitimate legislative goal of protecting the public health and welfare by curbing the level of alcohol abuse in our

²⁶ 574 P.2d at 21 [emphasis added].

²⁷ 574 P.2d at 21-23.

²⁸ *Id.* at 22.

²⁹ *Id.*

³⁰ 687 P.2d 332, 338 (Alaska App. 1984).

³¹ 687 P.2d at 338.

³² *Id.*

state.”³³ Thus there are limits to the right to privacy even in the home, when the activity being regulated is sufficiently harmful or dangerous.

The second area in which Alaska’s right to privacy affords a fundamental right is in the area of laws infringing upon “the fundamental right of personal autonomy.”³⁴ This primarily has to do with the right to control one’s own body. These cases involve reproductive freedom,³⁵ the right not to be forced to take psychotropic drugs,³⁶ the right to make medical decisions for oneself and ones children,³⁷ and (more prosaically), the right to select one’s hairstyle.³⁸ The right to “personal autonomy” also protects the right not to disclose sensitive personal information such as the names of patients who have consulted a physician specializing in sensitive matters such as contraception or abortion.³⁹

The plaintiffs argue that application of the smoking ordinance to their club falls within both of these areas. They first argue that the Eagles’ lodge is equivalent to a home (they refer to it as their “Aerie Home”). But the fact remains that they do not live there. A “home” is “a place where one lives; a residence.”⁴⁰ Calling the Eagles lodge the “Aerie Home” does not make it the members’ home, any more than the Home Depot is a railroad station. In fact, it would be unlawful for members to live in the “Aerie Home” because, as a premises licensed

³³ *Id.* at 339.

³⁴ *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001).

³⁵ *Valley Hospital Ass’n. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997).

³⁶ *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006).

³⁷ *Huffman v. State*, 204 P.3d 339 (Alaska April 3, 2009).

³⁸ *Breese v. Smith*, 501 P.2d 159, 169-70 (Alaska 1972).

³⁹ *Falcon v. Alaska Public Offices Comm’n.*, 570 P.2d 469 (Alaska 1977).

⁴⁰ *American Heritage Dictionary of the English Language* (4th ed. 2009).

for the sale of alcohol, it must be closed during specified hours each day.⁴¹ The “Aerie Home” is not a home.

Nor does regulation of smoking in the Eagles lodge implicate “the fundamental right of personal autonomy”. As noted above, that right extends to laws which infringe upon the right to control one’s own body. While the plaintiffs argue that the choice of what substances to take into one’s body implicates this right, this is not the analysis that has been used in considering other laws regulating ingestion of substances into one’s body.

The Supreme Court in *Erickson* specifically held that the right to privacy and autonomy involved in the ingestion of cocaine into one’s body did not make the ingestion, sale, or possession of cocaine a fundamental right.⁴² Similarly in *Harrison*, the court found that the consumption of alcoholic beverages – even in the home – is not a fundamental right.⁴³ In each case, the court applied *Ravin*’s less stringent test because ingestion of these substances did not implicate the fundamental right of personal autonomy.

Certainly tobacco is a different substance than cocaine or marijuana, with different effects on the user and others. One could debate whether it is a less dangerous or more dangerous substance than tobacco or alcohol. But the principle is the same: the choice of whether to ingest these substances into one’s body has been found not to implicate the fundamental right of personal autonomy.

⁴¹ State law sets mandatory closed hours of 5:00 am to 8:00 am daily. The City code sets additional closed hours of 1:00 am to 8:00 am on weekdays and 3:00 am to 8:00 am on weekends and holidays. CBJ Code 20.25.110; AS 04.16.010.

⁴² 574 P.2d 1, 12 (Alaska 1978).

⁴³ 687 P.2d 332, 338 (Alaska 1984).

Because the private club smoking ban does not implicate a fundamental right, it must be analyzed under *Ravin*'s less stringent test. Under this test, the court must determine whether the CBJ has shown both that the law is justifiable as a health and welfare measure, and that the means chosen bear a sufficiently close and substantial relationship to the legislative purpose of protecting the public health and welfare.⁴⁴

The toll of death and injury caused by consumption of tobacco is not subject to serious dispute. The American Cancer Society, in its *amicus* brief, describes the long history of regulation of tobacco, and the well established record of harm to the public health which results from its use. In *Ravin*, the Alaska Supreme Court noted that marijuana is "far more innocuous in terms of physiological and social damage than alcohol or tobacco."⁴⁵ The *amicus* cites to a series of studies documenting the adverse health effects of exposure to second hand smoke.⁴⁶ In adopting its initial smoking ordinance in 2001, the CBJ Assembly made findings about the thousands of deaths and illnesses which are caused by second hand smoke.⁴⁷

The plaintiffs do not dispute that use of tobacco and exposure to second hand smoke are harmful to the public health and welfare in general, or to the health of Eagles members in particular. Instead, they argue that they should be able to choose to expose themselves to those harmful effects in the club if they want to.

Given the serious public health consequences of second hand smoke, it is unquestionable that an ordinance prohibiting smoking in specified places where people gather together indoors is justifiable as a public health and welfare measure. The real question is

⁴⁴ 687 P.2d at 338; 574 P.2d at 21-22.

⁴⁵ 537 P.2d at 506.

⁴⁶ Brief of *amicus* at 13-17.

⁴⁷ Ordinance No. 2001-40, Exhibit 1 to CBJ Cross-motion for summary judgment.

whether the means chosen bear a sufficiently close and substantial relationship to the legislative purpose of protecting the public health and welfare. Under this standard, the city need not choose the least restrictive means to accomplish its purpose.⁴⁸

The Eagles' argument, in essence, is that the constitutional right to privacy gives Alaskans the right to engage in conduct which harms only themselves. The Alaska Supreme Court's decision in *Sampson v. State*, a challenge to Alaska's law prohibiting physician assisted suicide, suggests otherwise.⁴⁹ The plaintiffs in that case sought a declaratory judgment that their physicians were exempt from prosecution for assisting them to commit suicide. They argued that there was a fundamental right to end one's life under the privacy clause of the Alaska constitution. The Supreme Court disagreed, quoting its admonition in *State v. Erickson* 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."⁵⁰ The court went on to note that other Alaska cases have upheld regulation of private conduct where the only harm threatened was to the actor.⁵¹

More importantly, the court in *Sampson* emphasized that physician assisted suicide does not merely involve the question of whether there is a right to end one's life. The physician who assists in a suicide is causing harm to another person:

Even if we accepted the proposition that the state cannot regulate any aspect of the right to privacy in the absence of a threat of harm to others, *Sampson* and *Doe* would not prevail on their claim that physician-assisted suicide is a fundamentally protected right. The manslaughter statute's assisted suicide prohibition regulates the conduct of the physician who assists in a

⁴⁸ See, e.g., *Stevens v. Matanuska-Susitna Borough*, 146 P.3d 3 (Alaska App. 2006).

⁴⁹ 31 P.3d 38 (Alaska 2001).

⁵⁰ 31 P.3d at 95, quoting 574 P.2d at 21.

⁵¹ 31 P.3d at 95.

suicide, not the conduct of the patient who commits the suicide. And a physician who assists in a suicide undeniably causes harm to others.⁵²

A person who seeks the assistance of a physician to commit suicide is, plainly, consenting to be killed. Thus there is not a right to harm another person, even if the other person consents to the harm.

Similarly here, even if one could say that the smoker has a right to smoke in a private club, the smoker causes harm to others by means of second-hand smoke. The *Sampson* court emphasized that there are legitimate governmental interests in preserving human life and regulating dangerous substances and activities.⁵³ As a general rule, one's privacy rights end when one's activities cause harm to others. The state may regulate activities which "interfere[] in a serious manner with the health, safety, rights, and privileges of others or with the public welfare."⁵⁴

The *Sampson* court considered the question of whether a ban on physician assisted suicide bears a close and substantial relationship to legitimate governmental interests. The plaintiffs in that case contended that, without an exception to the ban on assisted suicide which would allow physicians to assist suicides for mentally competent, terminally ill patients, there was not such a close and substantial relationship. After wrestling with the moral and social policy questions involved with assisted suicide, the court concluded that this is ultimately a legislative question:

⁵² *Id.* [footnote omitted][emphasis added].

⁵³ *Id.* at 96.

⁵⁴ *State v. Erickson*, 574 P.2d at 21.

By broadly construing the privacy amendment to include the right to assisted suicide, we would run the risk of arrogating to ourselves those powers to make social policy that as a constitutional matter belong only to the legislature.⁵⁵

Certainly comparing smoking to assisted suicide would be hyperbole. The relevance of *Sampson* is that the court did not find that there is a right to harm others even if the person harmed consents to the harm.

It is not enough to say that the persons exposed to second-hand smoke have chosen to be in the Eagles Aerie Home. If it were, then no anti-smoking ordinance could be upheld as long as other persons present were there voluntarily. If a workplace, or a bar, or a restaurant is posted as a smoking zone, then everyone present has chosen to be there knowing there is smoke. Except in the case of public buildings, their presence is voluntary. In the case of a restaurant or a bar, even though they are not paying membership dues as with a private club, customers are paying to be there by the price they pay for their meals or drinks or even a cover charge. The fact that other people who would be subjected to second-hand smoke are there voluntarily does not preclude the City from prohibiting smoking in such establishments. Essentially, the people present – smokers and nonsmokers alike – have consented to the harmful effects of smoking. In the case of the Eagles Aerie 4200, about 15% of the members are non-smokers.⁵⁶

The City has a legitimate governmental interest in addressing the public health consequences of second-hand smoke. The City has elected to ban smoking in a range of indoor locations where people gather together outside their homes. It would have been reasonable for the CBJ Assembly to conclude that, this will reduce exposure to second-hand

⁵⁵ *Sampson*, 31 P.3d at 98, quoting *Krischer v. McIver*, 697 So.2d 97, 104 (Fla.1997).

⁵⁶ Affidavit of Larry Paul, paragraph 7.

smoke. As a result, it would have been reasonable for the CBJ Assembly to conclude that fewer people would get sick and die from smoke related ailments.

Without a doubt, the plaintiffs have expressed – in vigorous terms – their conviction that this ordinance is bad public policy. Without question, many citizens feel the same way.

Their views are entitled to respect and consideration. But as the Supreme Court put it in

Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough,

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.⁵⁷

I cannot overrule the policy choice made by the elected members of the CBJ Assembly.

There is a close and substantial relationship between the ordinance in question and the legitimate governmental interest of furthering the public health. As a result, I cannot find that this ordinance infringes upon the right to privacy set out in article I, section 22 of the Alaska constitution.

III. CONCLUSION:

For the reasons set forth above, the plaintiffs' motion for summary judgment is DENIED. The defendant's motion for summary judgment is GRANTED.

It is unclear, in light of the granting of summary judgment on plaintiffs' federal association and state privacy claims, the plaintiffs intend to proceed with their other claims (state association⁵⁸, state law preemption, or illegal intrusion).⁵⁹ If so, this should be treated as

⁵⁷ 527 P.2d 447, 42 (Alaska 1974).


⁵⁸ I am aware of no case holding that freedom of association is broader under the Alaska constitution than under the United States constitution. The plaintiffs' complaint raises both federal and state association claims. The motions for summary judgment only address federal law on freedom of association, and plaintiffs do not argue that there is a broader right under

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an order granting partial summary judgment and the court will need to schedule additional proceedings on the remaining claims. Plaintiffs should file a status report within 20 days indicating whether they will proceed on their other claims. If not, defendant should submit a proposed final judgment.

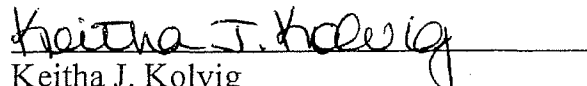
Entered at Juneau, Alaska this 14th day of October, 2009.


Philip M. Pallenberg
Superior Court Judge

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 14th day of October, 2009.

Paul Grant	John Hartle
Peter Maassen	


Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg

state law. If freedom of association under state law is no broader than under the First Amendment, then this decision also resolves the state law claims. Because, however, neither party mentions the Alaska constitution, it is not clear that the granting of CBJ's motion for summary judgment on federal law freedom of association resolves the state law claims.

⁵⁹ Because the right to privacy under the Alaska constitution is broader than the implied right to privacy under the United States constitution, resolution of the state law privacy claims in CBJ's favor also requires the conclusion that the ordinance does not violate the right to privacy under the United States constitution.

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 FRATERNAL ORDER OF EAGLES,
4 JUNEAU-DOUGLAS AERIE 4200,
5 MARK PAGE, BRIAN TURNER, R.D.
6 TRUAX, and LARRY PAUL,

7 Plaintiffs,

8 v.

9 CITY AND BOROUGH OF JUNEAU,

10 Defendant.

Filed In Chambers
State of Alaska, First District
at Juneau

DEC 11 2009

By Juli Johnson Deputy

Case No: 1JU-08-730 CI

11 **FINAL JUDGMENT**

12 This matter having come before the Court on the parties' cross-motions for summary
13 judgment, and the Court having entered its Decision on Motions for Summary Judgment on
14 October 14, 2009, and for the reasons set forth in that Decision, having denied the plaintiffs'
15 motion for summary judgment and having granted the defendant's motion for summary judgment,
16 and the plaintiffs' having advised the Court by a Notice Regarding Additional Claims filed on
17 November 20, 2009, that the plaintiffs do not intend to pursue the remaining claims,
18

19 NOW, THEREFORE, IT IS ORDERED that Final Judgment is entered against the
20 plaintiffs and in favor of the defendant, and the plaintiffs' Complaint is dismissed with prejudice.

21 In accordance with Civil Rule 82(c), the defendant may file a motion for attorney's fees
22 within 10 days after the date shown on the certificate of distribution of this Final Judgment.

23 DATED this 11 day of December, 2009.

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25
Philip M. Pallenberg
Superior Court Judge

Final Judgment

Fraternal Order of Eagles, et al. v. CBJ, Case No. 1JU-08-730 CI

Page 1 of 2

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CERTIFICATE OF DISTRIBUTION BY COURT

I certify that I served copies of the foregoing Final Judgment the following parties on the
14 day of December, 2009.

Paul Grant, Attorney for Plaintiffs, via court box

John Hartle, City Attorney, Attorney for Defendant, via court box

Paul Maassen, Attorney for Amicus, via first class mail



Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg