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]

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[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] *Haggblom 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 <u>membership</u> of private clubs, as distinguished from regulation of the <u>conduct</u> 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

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[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.'
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> 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. . . .
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> 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.
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> 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.

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[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

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[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

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[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

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[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.

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[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

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[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

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[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.

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[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

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[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:

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[52] *Id.* [footnote omitted][emphasis added].
[53] *Id.* at 96.
[54] *State v. Erickson*, 574 P.2d at 21.

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> 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

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[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 association[58], state law preemption, or illegal intrusion).[59] If so, this should be treated as

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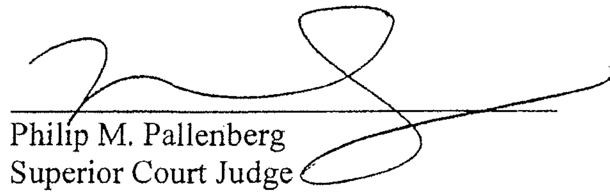
an order granting partial summary judgment and the court will need to schedule additional proceedings on the remaining claims. Plaintiffs should file a status report within 20 days indicating whether they will proceed on their other claims. If not, defendant should submit a proposed final judgment.

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

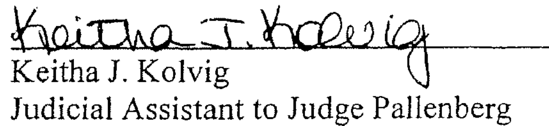


Philip M. Pallenberg
Superior Court Judge

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

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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.