

LEGAL SERVICES

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MEMORANDUM

April 2, 2014

SUBJECT: CSSB 209(): Constitutional problems with local option addition
(Work Order No. 28-LS1539\C)

TO: Senator Peter Micciche
Attn: Mindy Rowland

FROM: Kathleen Strasbaugh
Legislative Counsel

This memo addresses an issue with the local option provisions added to the newest draft of CSSB 209(): whether permitting a municipality to negate a law of statewide application is constitutional.

The Alaska statutes provide communities with the ability to adopt a local option with respect to alcoholic beverages and to certain gaming activity.¹ State law also authorizes municipal governments to adopt certain measures within parameters set by state law.² The Alaska Court of Appeals upheld a conviction under the alcohol local option law challenged on the grounds that it was unconstitutional because it unlawfully delegated the legislature's authority:

The fact that the local community is not itself enacting a state law when it holds a local option election disposes of Shetters' other arguments that local options are unconstitutionally enacted. It does not violate due process for local voters to elect to adopt a state law regulating alcoholic beverages without the opportunity to specifically vote on all the provisions of the state law. Nor does the possibility that a community might frequently change its local option establish an unlimited delegation of legislative power. Finally, because the community voters were not empowered to and in fact did not enact a state law, the elections were not subject to the constitutional provisions on initiative measures.

Shetters v. State, 832 P. 2d 181, 185 (Alaska Ct. App. 1992). In contrast, the local option requested for this bill would allow a community to opt to nullify the application of a state law. There is no precedent for this that I am aware of. Further it is not clear from the

¹ AS 04.11.490 - 04.11.509; AS 05.15.620 - 05.15.625.

² See generally, state law restrictions identified in AS 29.10.200.

Senator Peter Micciche
April 2, 2014
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legislation that the exercise of the local option serves a beneficial public purpose, unlike the public health purpose that is served by permitting a community to limit access to alcohol. And unlike the alcohol local option law, this bill's local option is essentially just an up or down vote on whether state law should apply. Given these factors, a challenge based on improper delegation of legislative authority may be more likely to be successful than it was in *Shetters*. See *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987).

Time does not permit an extended exploration or discussion of this issue, but I did want to alert you that the local option provision may be fatally flawed.

If I may be of further assistance, please advise.

KJS:lem
14-169.lem

Enclosure

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MEMORANDUM

April 7, 2014

SUBJECT: CSSB 209(): Smoking in Public Places
(Work Order No. 28-LS1539P)

TO: Senator Peter Micciche
Attn: Mindy Rowland

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed a new version of SB 209 that adds e-cigarettes stores to the exemptions and delays the effective date of the local option provisions of the bill for two years. I have also made some adjustments to AS 18.35.201 to acknowledge the local option exception, and eliminated "airport fuel facility" from the list of prohibited places because such facilities are covered by other safety laws -- and this bill is designed to deal with the health, not safety, aspects of smoking.

This memo addresses further the potential legal problem with the local option provisions of the law discussed in a previous memo.¹ As previously noted, there are other local option election provisions in the Alaska Statutes.² There are also circumstances under which by ordinance a local government can elect to participate in a state program.³ There is some precedent for the exercise of an option that permits a municipal government to opt out of a state law program, an example I had not recalled when I wrote to you last. *See, e.g.,* the local option provisions of the Public Employment Relations Act (PERA):

This Act is applicable to organized boroughs and political subdivisions of the state, home rule or otherwise, unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply.

¹ The earlier memo was sent to you with version "C" on April 2, 2014.

² AS 04.11.490 - 04.11.509; AS 05.15.620 - 05.15.625.

³ *See* AS 28.10.431, which allows a municipality to elect to assess a vehicle registration tax and have the state collect it.

Ch. 113, § 4, SLA 1972.⁴

Here, however, the municipality would be opting out of a statute of otherwise statewide application that is enacted to benefit the public health, the violation of which can result in the imposition of a penalty that is enforced through the criminal justice system. In other circumstances, Alaska's appellate courts have struck down municipal enactments that conflict with, or are significantly inconsistent with laws of statewide application. For example, an ordinance that provided for a maximum penalty that was higher than that in state law for the same offense was struck down as unlawful in *Anderson v. Municipality of Anchorage*, 645 P.2d 205, 213 (Alaska Ct. App. 1982). In overruling a municipal drunk driving ordinance that differed from state law, the Alaska Court of Appeals held that despite the liberal powers of self government granted to Alaska municipalities, the Municipality of Anchorage could not enforce an ordinance that was inconsistent with state law. *Simpson v. Municipality of Anchorage*, 635 P.2d 1197, 1200 (Alaska Ct. App. 1981).⁵ In *Adkins v. Lester*, 530 P.2d 11, 14 (Alaska 1974), the Alaska Supreme Court struck down a Fairbanks ordinance that required that emergency vehicles use audible signals at all times where state law permitted such vehicles to be driven without audible signals under some circumstances, on the grounds that the commissioner of public safety was authorized to adopt a statewide scheme of traffic safety regulations, and the local ordinance interfered with the regulation in question.⁶

There are significant distinctions between the PERA exemptions and the gaming and alcoholic beverage local option laws. The improper delegation of legislative authority issue as explained in the previous memorandum issued to you on this subject remains significant.

In addition, if the law were challenged, it might be on the grounds that a person's right to equal protection would be violated because of the different treatment a person might receive if the person lived in a community that did not opt out (and was subject to a penalty for violation of the law), or the public health benefits a person might lose if the person lived in a community that opted out. Alcoholic beverage local option law has been upheld against equal protection challenges because of the great harm caused by

⁴ However, a municipality was not permitted to opt out of the law where the purpose of doing so was to thwart organizing activities by employees seeking to avail themselves of the rights conferred by PERA. *Kodiak Island Borough v. State, Department of Labor*, 853 P.2d 1111, 1114 (Alaska 1993).

⁵ But see *Cremer v. Anchorage*, 575 P.2d 306, 307 - 08 (Alaska 1978) (local "driving while suspended or revoked" ordinance upheld that applied on private property held not inconsistent with state law, which was limited to public property).

⁶ Additionally, state motor vehicle statutes have specific provisions concerning consistency between state and local law.

Senator Peter Micciche
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alcohol abuse warrants criminalizing alcohol offenses in communities where the option has been exercised:

[T]he state has a "compelling interest in curbing the problem of alcohol abuse." *Harrison v. State*, 687 P.2d 332, 340 (Alaska App. 1984).

In *Harrison*, we discussed the numerous problems facing this state as a result of alcohol abuse. We pointed out that "in response to the growing evidence of a strong relationship between alcohol abuse and crime, Alaska's local option law was enacted in 1980." *Id.* at 335. The statutes that Burnor questions in this case are part of the fabric of the local option law. See *Tuckfield v. State*, 805 P.2d 982, 983-84 (Alaska App. 1991). In discussing Harrison's contention that the local option law violated equal protection because it permitted one community to ban the importation of alcoholic beverages and simultaneously permitted other communities to allow importation of alcoholic beverages, we stated:

The question is whether differences in treatment are reasonable in light of the balance between the importance of the legislative intent, on the one hand, and the interest of the individual on the other.... We see no basis for concluding that differences in the treatment of citizens from different communities under the local option law should be considered constitutionally significant when those differences result only from the extent to which individual communities elect to implement that law. When the state attacks a complex problem it need not choose between attacking every aspect of that problem and doing nothing at all.

Harrison, 687 P.2d at 341 (citation omitted).

Burnor v. State, 829 P.2d 837, 840 (Alaska Ct. App. 1992). Here, the local option is to allow smoking in public places to continue, an objective that does not appear to be in keeping with the overall purpose of the legislation, making it more vulnerable than it might otherwise be to challenge.

If I may be of further assistance, please advise.

KJS:ray
14-162.ray

Enclosure

⬢ Positive Last updated January 27, 2015 11:50:40 am AKST
⬢ Positive When saved to folder January 27, 2015 11:48:23 am AKST
⬢ Positive
As of: January 27, 2015 3:54 PM EST

Fraternal Order of Eagles v. City & Juneau-Douglas Aerie 4200

Supreme Court of Alaska
July 1, 2011, Decided
Supreme Court No. S-13748, No. 6574

Reporter

254 P.3d 348; 2011 Alas. LEXIS 57

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.

Prior History: **[**1]** Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Philip M. Pallenberg, Judge. Superior Court No. 1JU-08-00730 CI.

Core Terms

smoking, private club, ban, ordinance, right to privacy, tobacco, regulation, intimate association, privacy, superior court, fundamental rights, intimate, smokers, rights, ingestion, interfere, freedom of association, restaurants, second-hand, personal autonomy, summary judgment, smoking ban, membership, infringed, alcoholic beverage, associational, implicate, alcohol, Cancer, places

Case Summary

Procedural Posture

Appellants, a private club and its members, sued respondent, the City and Borough of Juneau, Alaska, claiming a smoking ban infringed upon their freedom of association under the First Amendment and their privacy rights under Alaska Const. art. I, § 22. The Superior Court of the State of Alaska, First Judicial District, Juneau, denied appellants' motion for summary judgment and granted summary judgment to the City. Appellants filed an appeal.

Overview

Appellants, a private club and its members, challenged an ordinance banning smoking in private clubs, City and Borough of Juneau, Alaska, Code § 36.60. The Supreme Court of Alaska upheld the ordinance. Because the smoking ban regulated only conduct, it did not implicate the freedom of association protected by U.S. Const. amend. I. The smoking ban did not violate appellants' right to privacy under Alaska Const. art. I, § 22, because private clubs did not enjoy privacy protections afforded in the home. As smoking tobacco was not a fundamental right of personal autonomy, strict scrutiny did not apply. The ban on smoking in private clubs bore a close and substantial relationship to the legitimate state purpose of protecting the public health.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

Governments > Local Governments > Ordinances & Regulations

Micciche Peter

HN1 The City and Borough of Juneau, Alaska, has adopted a "Smoking in Public Places Code," City and Borough of Juneau, Alaska, Code § 36.60.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

Governments > Legislation > Effect & Operation > Amendments

Governments > Local Governments > Ordinances & Regulations

HN2 City and Borough of Juneau, Alaska, Code § 36.60, the anti-smoking ordinance, has been amended several times. Originally it exempted enclosed areas used for conferences or meetings in restaurants, service clubs, hotels, or motels while the spaces are in use for private functions as well as bars and bar restaurants. In 2004 it was amended to ban smoking in "bar restaurants" effective January 2, 2005, and to ban smoking in "bars" effective January 2, 2008. In 2007 it was amended to prohibit smoking and the use of smokeless tobacco products at several public and private medical facilities, including the public streets and sidewalks adjacent to those facilities. It has also been amended to prohibit smoking in bus passenger shelters.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

Governments > Legislation > Effect & Operation > Amendments

Governments > Local Governments > Ordinances & Regulations

HN3 In 2008, an amendment to City and Borough of Juneau, Alaska, Code § 36.60 changed the name from the "Smoking in Public Places Code" to the "Second-Hand Smoke Control Code" and eliminated the exception for smoking in retail tobacco stores. The amended ordinance broadened the definition of a "bar;" eliminated the exception to the smoking ban for "private functions;" and specifically prohibited smoking in private clubs that offer food or alcoholic beverages for sale, regardless of the number of employees.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN4 The Supreme Court of Alaska reviews a grant of summary judgment de novo while drawing all factual inferences in favor of, and viewing the facts in the light most favorable to the non-prevailing party. A grant of summary judgment will be affirmed when there are no genuine issues of material fact, and the prevailing party was entitled to judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN5 The Supreme Court of Alaska applies its independent judgment to questions of constitutional law and will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.

Governments > Local Governments > Duties & Powers

HN6 Alaska Const. art. X, § 11 provides home rule municipalities with broad powers: A home rule borough or city may exercise all legislative powers not prohibited by law or by charter. The Alaska Constitution also requires that a liberal construction shall be given to the powers of local government units. Alaska Const. art. X, § 1.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Governments > Local Governments > Ordinances & Regulations

HN7 A duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional. Courts should construe enactments to avoid a finding of unconstitutionality to the extent possible.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN8 The right to associate is a fundamental right protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court has recognized that individuals have a First Amendment right to associate in two situations: (1) intimate association, when individuals enter into and maintain certain intimate human relationships; and (2) expressive association, when individuals associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

HN9 While smoking bans restrict where a person may smoke, it is a far cry to allege that such restrictions unduly interfere with smokers' right to associate freely with whomever they choose. Nothing in the Constitution engrafts upon First Amendment protections any other collateral social interaction, whether eating, drinking, dancing, gambling, fighting, or smoking.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

HN10 An ordinance prohibiting smoking in bars and restaurants, no matter how applied, cannot infringe on the right of expressive association.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

Governments > Local Governments > Ordinances & Regulations

HN11 An ordinance banning smoking in private clubs does not implicate the right to intimate association under the First Amendment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

HN12 The First Amendment protects the ability to choose one's intimate associates freely, not the ability to engage in any conduct in any place so long as one is interacting with his or her intimate associates.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN13 See Alaska Const. art. I, § 22.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN14 The explicit guarantee of privacy under Alaska Const. art. I, § 22 provides Alaskan citizens with greater protection than the federal constitution. Although the Supreme Court of Alaska has recognized a strong right to personal autonomy and privacy under the Alaska Constitution, it has also clearly stated that the rights to privacy and liberty are neither absolute nor comprehensive; their limits depend on a balance of interests that will vary depending on the importance of the rights infringed. When the state interferes with a fundamental aspect of the right to privacy, the government must demonstrate a compelling governmental interest and the absence of a less restrictive means to advance that interest. For interference with a non-fundamental aspect of privacy, the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN15 The Supreme Court of Alaska has held two categories of privacy rights are fundamental: those concerning personal autonomy and those protecting a distinctive situs — the home. There is some overlap between these two areas because the right to privacy in the home is directly linked to a notion of individual autonomy.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

HN16 Smoking tobacco is not a fundamental right of personal autonomy.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Criminal Law & Procedure > ... > Controlled Substances > Possession > General Overview

HN17 There is no fundamental right, either under the Alaska or federal constitutions, either to possess or ingest marijuana.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

HN18 There is no fundamental right to possess or consume alcohol.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Smoking Bans

HN19 There is not a fundamental right of personal autonomy under the Alaska Constitution to ingest tobacco.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > ... > Controlled Substances > Possession > General Overview

HN20 Because of the distinctive nature and importance of the home, Alaskans have a fundamental right to privacy in their homes. This fundamental right to privacy in the home encompasses the possession and ingestion of substances such as marijuana, subject to two important limitations: First, the use or possession must be limited to a purely personal, non-commercial context in the home; and second, the right must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > ... > Controlled Substances > Possession > General Overview

HN21 The right to possess and ingest certain substances encompassed by the right to privacy is strictly limited to a purely personal, non-commercial context in the home. It is the distinctive nature of an individual's home that is recognized as deserving of special protection.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Police Powers

HN22 Alaska cases do not support the argument that the government may not abridge any aspect of personal privacy unless it involves conduct posing a threat of harm to another. The Supreme Court of Alaska has rejected the argument that the state cannot regulate conduct that poses a threat of harm to others if the potential victims consent to the harm.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN23 No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely.

Healthcare Law > Medical Treatment > End-of-Life Decisions > Assisted Suicide

HN24 A physician who assists in a suicide undeniably causes harm to others even with the patient's consent.

Counsel: Paul H. Grant, Law Office of Paul H. Grant, Juneau, for Appellants.

John W. Hartle, City Attorney, Juneau, for Appellee.

Peter J. Maassen, Ingaldson, Maassen & Fitzgerald, P.C., Anchorage, for Amicus Curiae American Cancer Society Cancer Action Network.

Judges: Before: Carpeneti, Chief Justice, Fabe, Winfree, Christen, and Stowers, Justices.

Opinion by: FABE

Opinion

[*350] FABE, Justice.

I. INTRODUCTION

The City and Borough of Juneau has an ordinance that prohibits smoking in certain places. In March 2008 the City Assembly amended that ordinance to prohibit smoking in "private clubs" that offer food or alcoholic beverages for sale. The Fraternal Order of Eagles, Juneau-Douglas Aerie 4200 and three of its members challenged the ban on smoking in private clubs both on its face and as applied to their Aerie facility. The Eagles argued that the prohibition on smoking in private clubs violates both their First Amendment rights under the United States Constitution and their privacy rights under the Alaska Constitution. We conclude that the ban on smoking in private clubs is a regulation [*2] of conduct that does not implicate the freedom of association under the First Amendment to the United States Constitution and that the ban on smoking in private clubs does not violate the Eagles' right to privacy under article I, section 22 of the Alaska Constitution. We therefore affirm the superior court's order granting the City and Borough of Juneau's motion for summary judgment.

II. FACTS AND PROCEEDINGS

In October 2001 **HN1** the City and Borough of Juneau (the City) adopted the first version of its "Smoking in Public Places Code," City and Borough of Juneau Code (CBJ) 36.60. The City Assembly found that "in order to protect the public health it is necessary to control the amount of tobacco smoke in public places." The City Assembly also included in its findings the conclusions of a 1992 report published by the United States Environmental Protection Agency, titled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, that outlined the dangers of second-hand smoke, including increased risks for lung cancer and coronary heart disease among nonsmokers, increased risk of death from lung cancer and coronary heart disease, respiratory problems in children, and lower [*3] respiratory tract infections.

Since 2001 **HN2** the City's anti-smoking ordinance has been amended several times. Originally it exempted "enclosed areas used for conferences or meetings in restaurants, service clubs, hotels, or motels while the spaces are in use for private functions" as well as "bars and bar restaurants." In 2004 it was amended to ban smoking in "bar restaurants" effective January 2, 2005, and to ban smoking in "bars" effective January 2, 2008. In 2007 it was amended to prohibit smoking and the use of smokeless tobacco products at several public and private medical facilities, including the public streets and sidewalks adjacent to those facilities.¹ Later that year it was also amended to prohibit smoking in bus passenger shelters.

¹ The prohibitions on smokeless tobacco appear only in the provisions regulating medical facilities and are not at issue in this appeal. CBJ 36.60.010(b) (2008).

But the ban on smoking in "bars" and "bar restaurants" did not include private clubs until 2008, when a concern was raised that private clubs selling food or alcohol had an unfair business advantage. In response the City Assembly directed the City Attorney to prepare a new amendment to the [**4] ordinance that would "clearly prohibit smoking in all places where either alcoholic beverages or food are offered for sale." **HN3** In March 2008 the City Assembly adopted the amendment to the ordinance now at issue in this appeal. This amendment made several changes to the ordinance, including changing the name from the "Smoking in Public Places Code" to the "Second-Hand Smoke Control Code" and eliminating the exception for smoking in retail tobacco stores. The amended ordinance [**351] broadened the definition of a "bar"; eliminated the exception to the smoking ban for "private functions"; and specifically prohibited smoking in private clubs that offer food or alcoholic beverages for sale, regardless of the number of employees.²

The Fraternal Order of Eagles, Juneau-Douglas Aerie 4200 is a private nonprofit charitable corporation organized under the laws of the State of Alaska. Aerie 4200 is a local chapter of the international organization known as the Fraternal [**5] Order of Eagles. Aerie 4200 has 262 full members, including both men and women, and 134 ladies auxiliary members. Members pay a \$15 initiation fee and \$35 in annual dues. New members must be approved by a unanimous vote of the existing members. All members must subscribe to the club rules. The club rules contain an expectation that members will treat the Aerie facility as "an extension of the members' homes" and that the members will have an expectation of privacy while in the facility.

Aerie 4200 holds a license to sell alcoholic beverages in the Aerie facility and is thus subject to Title 4 of the Alaska Statutes, titled "Alcoholic Beverages." Alaska Statute 04.16.010 requires that establishments licensed to sell alcohol, such as the Aerie facility, be closed between 5:00 a.m. and 8:00 a.m. every day. Aerie 4200 employs four part-time bartenders, in addition to a business manager who also serves as a bartender. All five of these employees are members of Aerie 4200 and all five are smokers.³

Aerie 4200's activities are "intended to produce a financial base" [**6] from which contributions to worthy causes are made. In 2007 Aerie 4200 contributed almost \$25,000 to various charities. Aerie 4200 has observed a decline in applications for new membership and estimate that revenues from their Aerie facility have declined 25% since the extension of the smoking ban to private clubs.

The Aerie facility is available only to members, auxiliary members, and their guests. Guests must be signed into the guestbook and sponsored by a member who is present. Each guest is permitted to visit three times before being expected to apply for membership. These requirements are occasionally relaxed in situations such as "providing assistance to people in distress or allowing prospective members to evaluate the club." The Aerie facility is also opened up to the general public four times each year for fundraising events, but no smoking is allowed in the facility during these events. Except on these public occasions, smoking is allowed by a "House Rule" adopted unanimously by Aerie 4200's membership in April 2008.

In July 2008 Aerie 4200 and three of its members (collectively, the Eagles) filed suit against the City, alleging that the portion of the Second-Hand Smoke Control [**7] Code that bans smoking in private clubs is unconstitutional both on its face and as applied to Aerie 4200. Specifically, the Eagles claimed that the smoking ban infringed upon their freedom of association under the First Amendment to the United States Constitution and their privacy rights under article I, section 22 of the Alaska Constitution.

Both the Eagles and the City agreed that the case could be resolved as a matter of law on summary judgment. The superior court considered memoranda from both parties as well as an amicus memorandum from the American

² For places of employment other than private clubs, the ordinance currently contains an exception to the smoking ban if there are four or fewer employees, unless the place of employment is an "enclosed public place." CBJ 36.60.030(a)(2) (2008).

³ According to an affidavit from the Grand Worthy President of Aerie 4200, approximately 85% of Aerie 4200's members are smokers.

Cancer Society.⁴ The amicus memorandum addressed the legal issues presented but also provided more recent factual information about the dangers of second-hand smoke, including various studies detailing the positive public health effects of anti-smoking ordinances. On October 14, 2009, [*352] the superior court denied the Eagles' motion for summary judgment and granted summary judgment to the City on both the federal association claim and the state privacy claim.⁵ The superior court entered final judgment on December 11, 2009. The Eagles appeal.

III. STANDARD OF REVIEW

HN4 We review a grant of summary judgment de novo while drawing "all factual inferences in favor of, and viewing the facts in the light most favorable to the non-prevailing party."⁶ A grant of summary judgment will be affirmed "when there are no genuine issues of material fact, and the prevailing party . . . was entitled to judgment as a matter of law."⁷ Here, the parties [*9] agreed that the case could be decided on summary judgment and do not contend that there are material facts in dispute. **HN5** We apply our independent judgment to questions of constitutional law⁸ and will "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."⁹

HN6 Article X, section 11 of the Alaska Constitution provides home rule municipalities with broad powers: "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter." The Alaska Constitution also requires that "[a] liberal construction shall be given to the powers of local government units."¹⁰ We have made clear that **HN7** "[a] duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional"¹¹ and that "[c]ourts should construe enactments to avoid a finding of unconstitutionality to the extent possible."¹²

IV. [**10] DISCUSSION

A. The Ban On Smoking In Private Clubs Is A Regulation Of Conduct That Does Not Implicate The Eagles' Freedom Of Association Under The First Amendment To The United States Constitution.

HN8 "The right to associate is a fundamental right protected by the First Amendment and the due process clause of the Fourteenth Amendment."¹³ The United States Supreme Court has recognized that individuals have a First Amendment right to associate in two situations: (1) "intimate association," when individuals "enter into and maintain certain intimate human relationships," and (2) "expressive association," when individuals "associate for

⁴ The superior court granted the American Cancer Society's motion for leave to participate as amicus [**8] curiae on December 22, 2008. The American Cancer Society also submitted an amicus brief to this court.

⁵ The Eagles also raised several other claims in their complaint, including that their right to association under the Alaska Constitution was violated, that the anti-smoking ordinance was preempted by a comprehensive state scheme for regulating alcohol and tobacco, and that the Juneau police have unlawfully intruded into the Aerie facility when seeking to enforce the ban on smoking. In its decision on summary judgment, the superior court requested that the Eagles file a status report indicating whether they were choosing to proceed with these remaining claims. The Eagles filed a Notice Regarding Additional Claims on November 20, 2009, advising the court that they did not intend to pursue these claims.

⁶ Rockstad v. Erikson, 113 P.3d 1215, 1219 (Alaska 2005).

⁷ *Id.*

⁸ State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 908 (Alaska 2001).

⁹ Alaskans for Efficient Gov't, Inc. v. State, 153 P.3d 296, 298 (Alaska 2007) (quoting Sonneman v. State, 969 P.2d 632, 636 (Alaska 1998)).

¹⁰ Alaska Const. art. X, § 1.

¹¹ Treacy v. Municipality of Anchorage, 91 P.3d 252, 260 (Alaska 2004).

¹² *Id.*

¹³ In re Mendel, 897 P.2d 68, 76 (Alaska 1995) (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)).

the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion." ¹⁴

For the Eagles to prevail on their challenge to the City's ban on smoking in private clubs they "must demonstrate that the ordinance infringes on one of these two protected [*353] areas of association." ¹⁵ The Eagles focus their arguments [*11] on the "intimate association" prong. ¹⁶ The Eagles argue that (1) the "specific and unique characteristics" of their group and the Aerie facility, such as its small membership and restrictive policies for admitting guests and new members, make the relationships among their members the type of intimate association protected under the First Amendment; and (2) because approximately 85% of their members are smokers, prohibiting smoking in the Aerie facility unduly interferes with those relationships by essentially "telling members to 'go elsewhere.' "

To support this argument the Eagles point to the United States Supreme Court decision in *Roberts v. United States Jaycees*, which [*12] held that state human rights legislation requiring the Jaycees to admit women did not abridge the male members' freedom of association. ¹⁷ In *Roberts*, the Court noted that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State" because such relationships are "a fundamental element of personal liberty." ¹⁸ In order to enjoy this protection, however, a relationship must be "highly personal." ¹⁹ Noting that family bonds are the clearest example of such highly personal relationships, the Court explained that relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" will trigger the protections of the First Amendment. ²⁰ Therefore, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." ²¹ The Eagles argue that [*13] this language requires us to first determine whether Aerie 4200 consists of the type of intimate relationships protected under the freedom to associate.

The City counters that the ordinance does not implicate the freedom of association because it "does not regulate who may associate with whom" but instead only "regulates certain *conduct* in certain places." (Emphasis in original.) The superior court also emphasized the distinction between the cases cited by the Eagles, including *Roberts*, which involve "the regulation of the *membership* of private clubs," and regulations that only pertain to "the *conduct* of members." (Emphasis in original.) As the superior court explained, cases involving the regulation of membership have a direct impact on individuals' choice of whom to associate with, while this case concerns "what people can choose to do while associating." Because of this conclusion, the superior court did not reach the question whether Aerie 4200 consists of intimate relationships possessing the "distinctive characteristics" ²² that would afford heightened constitutional protection.

¹⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

¹⁵ *Taverns For Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 849 (N.D. Ohio 2004).

¹⁶ While the Eagles maintain that their exercise of expressive (as opposed to intimate) association rights has been "hampered by the ordinance because members have been made to feel unwelcome and have been discouraged from attendance," they admit that "all evidence on this point is anecdotal" and that "any attempt to conclusively link the ordinance with a chilling of [the Eagles'] expressive associational rights is difficult at best."

¹⁷ 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

¹⁸ *Id.* at 617-18.

¹⁹ *Id.* at 618.

²⁰ *Id.* at 619-20.

²¹ *Id.* at 620.

²² See *id.* at 621.

Numerous ^[**14] state and federal courts have reached similar conclusions when considering *First Amendment* challenges to ordinances that restrict smoking. As the Washington Supreme Court noted: "Other courts have universally rejected challenges to smoking bans on the grounds they interfere with freedom of association."²³

^[*354] The first group of these cases considered ordinances banning smoking in places of public accommodation such as restaurants or bars. In *NYC C.L.A.S.H., Inc. v. City of New York*, the federal district court rejected the "expressive association" argument that state and city laws prohibiting smoking in bars and restaurants interfered with the rights of smokers to associate while exercising their First Amendment rights.²⁴ In *C.L.A.S.H.*, a smokers'-rights organization ^[**15] argued that "to bar the act of smoking in all privately owned places that are open to the public deprives smokers of a necessary venue for conducting their private social lives."²⁵ The federal district court concluded that *HN9* "[w]hile the Smoking Bans restrict where a person may smoke, it is a far cry to allege that such restrictions unduly interfere with smokers' right to associate freely with whomever they choose" and that "[n]othing in the Constitution engrafts upon First Amendment protections any other collateral social interaction, whether eating, drinking, dancing, gambling, fighting, or smoking."²⁶ As the *C.L.A.S.H.* court noted, the effect of this "'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."²⁷

In *Taverns for Tots v. City of Toledo*, a federal district court in Ohio similarly found that *HN10* an ordinance prohibiting ^[**16] smoking in bars and restaurants, "no matter how applied, cannot infringe on the right of expressive association."²⁸ That court quoted the opinion in *NYC C.L.A.S.H.* and further explained that the ordinance "do[es] not interfere with the ability of members [of Taverns for Tots] to get together for any lawful purpose, including the exercise of expressive activity The ordinance only prevents smoking in public places."²⁹

Several other decisions, both at the federal and state level, have addressed the direct question whether an ordinance prohibiting smoking in private clubs unconstitutionally interferes with intimate associational rights. In *Players, Inc. v. City of New York*, the federal district court for the Southern District of New York again ruled that New York City's smoking ban was ^[**17] constitutional, even when it banned smoking in a private club "with a long and storied past."³⁰ The court rejected the club's argument under the intimate association prong, writing:

[E]ven if Players had not waived the opportunity to present facts in support of its claim to the right of intimate association . . . 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 members, or interaction among

²³ *Am. Legion Post #149 v. Washington State Dep't of Health*, 192 P.3d 306, 323 (Wash., 2008); see, e.g., *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 544-45 (S.D.N.Y. 2005); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 849-53 (N.D. Ohio 2004); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 23 P.3d 675, 681 (Ariz. App. 2001); *Am. Lithuanian Naturalization Club v. Board of Health of Athol*, 446 Mass. 310, 844 N.E.2d 231, 242 (Mass. 2006).

²⁴ 315 F. Supp. 2d 461, 472-76 (S.D.N.Y. 2004).

²⁵ *Id.* at 473 (citation omitted).

²⁶ *Id.* at 473-74.

²⁷ *Id.* at 474.

²⁸ 341 F. Supp. 2d at 852.

²⁹ *Id.* at 851. The federal district court in *Taverns for Tots* also rejected the plaintiff's intimate association claim, but on the basis that the purpose of Taverns for Tots was to evade the anti-smoking ordinance and that such an organization "is not the kind of intimate associational activity that either enjoys or deserves protection under the *First Amendment*." *Id.* at 850.

³⁰ 371 F. Supp. 2d 522, 525 (S.D.N.Y. 2005).

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.³¹

With regard to Players' expressive associational rights, the court cited *NYC C.L.A.S.H.* to again reject the club's First Amendment [*355] argument.³²

State courts have also upheld anti-smoking ordinances, even when applied to private clubs. In *American Lithuanian Naturalization Club v. Board of Health of Athol*, the Supreme Judicial [**18] Court of Massachusetts upheld a challenge to a smoking ban that prohibited smoking in all enclosed areas of local private clubs.³³ The court rejected the intimate association argument advanced by three private clubs that their members would no longer socialize at their facilities if smoking was banned, holding that there was "no showing that enforcement of the town regulation will infringe the members' right to maintain relationships with each other."³⁴

In the closest factual analogy to this case, *American Legion Post #149 v. Washington State Department of Health*, the Washington Supreme Court considered a challenge to a statute and ordinance prohibiting smoking in any place of employment.³⁵ Although the Washington Supreme Court considered the relevant factors and determined that American Legion Post #149 was not an intimate association because of its large membership, the court indicated that there would be no violation of the group's rights even if it had been deemed an intimate association: "Even if the Post were deemed to facilitate intimate human relationships, the ban does not directly interfere with such relationships or a person's [**19] ability to join the Post. Instead, it merely prohibits smoking in the Post's building when employees are present."³⁶

We agree with these other courts that *HN11* an ordinance banning smoking in private clubs does not implicate the right to intimate association under the *First Amendment*. Even assuming the Eagles' relationships are of the highly personal type that receive heightened constitutional protection, the ordinance does not regulate or interfere with the members' "choices to enter into and maintain"³⁷ those relationships. The ordinance does not regulate the membership of Aerie 4200 or who may associate with whom; it only regulates the conduct of members in certain places.

The Eagles argue that the ordinance unduly interferes with "how, when, and where club members choose to partake of their intimate associations." The Eagles essentially urge us (1) to adopt the "association plus" theory in spite of the uniform decisions of other courts and (2) to hold that "the right of intimate association includes a right to engage in any lawful activities the participants may choose." But *HN12* the *First Amendment* [**20] protects the ability to choose one's intimate associates freely, not the ability to engage in any conduct in any place so long as one is interacting with his or her intimate associates. As Judge Pallenberg persuasively explained:

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

³¹ *Id.* at 545.

³² *Id.* at 545-46.

³³ 446 Mass. 310, 844 N.E.2d 231 (Mass. 2006).

³⁴ *Id.* at 242.

³⁵ 164 Wn.2d 570, 192 P.3d 306 (Wash. 2008).

³⁶ *Id.* at 323.

³⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

other activities. . . . People are free to join the Eagles or not; they are just prohibited from smoking inside the club.

Because the smoking ban regulates only conduct, we hold that it does not implicate the freedom of association protected by the First Amendment to the United States Constitution. We do not reach the question whether Aerie 4200 consists of the highly personal relationships that receive heightened protection under the right to intimate **[**21]** association.

[*356] B. The Ban On Smoking In Private Clubs Does Not Violate The Eagles' Right To Privacy Under Article I, Section 22 Of The Alaska Constitution.

HN13 Article I, section 22 of the Alaska Constitution states that "the right of the people to privacy is recognized and shall not be infringed." We have held that **HN14** this explicit guarantee of privacy provides Alaskan citizens with greater protection than the federal constitution.³⁸ But although we have recognized a strong right to personal autonomy and privacy under the Alaska Constitution, we have also clearly stated that "the rights to privacy and liberty are neither absolute nor comprehensive . . . their limits depend on a balance of interests" that will vary depending on the importance of the rights infringed.³⁹ When the state interferes with a fundamental aspect of the right to privacy, the government must demonstrate a "compelling governmental interest and the absence of a less restrictive means to advance that interest."⁴⁰ For interference with a non-fundamental aspect of privacy, "the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest." **[**22]**⁴¹ Thus, to determine whether the Eagles' right to privacy has been violated, we must first evaluate the nature of the Eagles' rights, if any, that are abridged by the ban on smoking in private clubs, and then consider whether that abridgement is justified.⁴²

HN15 We have held that two categories of privacy rights are fundamental: those concerning personal autonomy and those protecting a distinctive situs — the home.⁴³ We have recognized that there is some overlap between these two areas because "the right to privacy in the home is directly linked to a notion of individual autonomy."⁴⁴ In this case, the Eagles ask us to hold that there is a fundamental privacy right "to ingest a legal substance — tobacco — in a private club facility." The Eagles argue that the Aerie facility serves as an extension of the members' homes and that the ingestion of tobacco within the **[**23]** Aerie facility should be protected under our decision in *Ravin v. State*, which held that the right to privacy protects the possession by adults of small quantities of marijuana in the home for personal use.⁴⁵ The City counters that smoking is not a fundamental right of personal autonomy and that the Aerie facility should not receive the same special protection as the home. The superior court found that the regulation of smoking does not "implicate the fundamental right of personal autonomy" and that the Aerie facility is not the equivalent of a home.

1. Smoking tobacco is not a fundamental right of personal autonomy.

We agree with the superior court that, standing alone, **HN16** smoking tobacco is not a fundamental right of personal autonomy. This conclusion flows directly from our previous cases. Our decision in *Ravin* was firmly rooted in the constitutional protection for privacy in the home, and specifically held that **HN17** "there is no fundamental

³⁸ *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138, 150 (Alaska 1977).

³⁹ *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

⁴⁰ *Id.*, see *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978); *Ravin v. State*, 537 P.2d 494, 497-98 (Alaska 1975).

⁴¹ *Sampson*, 31 P.3d at 91.

⁴² See *Harrison v. State*, 687 P.2d 332, 337 (Alaska App. 1984).

⁴³ See *Sampson*, 31 P.3d at 93-94 (describing the holdings in several personal autonomy cases and in *Ravin*).

⁴⁴ *Id.* at 94 (citing *Ravin*, 537 P.2d at 503-04).

⁴⁵ 537 P.2d at 504.

right, either under the Alaska or federal constitutions, either to possess or ingest [**24] marijuana." ⁴⁶ Similarly, in *State v. Erickson*, we rejected the argument that the right to privacy protected the use of cocaine within the home and held that "the defendants' particular rights to privacy and autonomy involved cannot be read so as to make the ingestion, sale or [**357] possession of cocaine a fundamental right." ⁴⁷

Aerie 4200 argues that these holdings in *Ravin* and *Erickson* are distinguishable because tobacco, unlike marijuana or cocaine, is a legal substance. The court of appeals addressed a similar argument in *Harrison v. State*, which upheld the constitutionality of Alaska's local option law, and concluded that **HN18** "there is no fundamental right to possess or consume alcohol." ⁴⁸ We agree with this conclusion of the court of appeals in *Harrison* and conclude that it applies here as well. **HN19** There is not a fundamental right of personal autonomy under the Alaska Constitution to ingest tobacco.

2. The ban on smoking in private clubs does not violate the fundamental right to privacy in the home.

In *Ravin*, however, we recognized that we could not dispose of Ravin's privacy claims simply by holding that there [**25] was no constitutional right to possess or smoke marijuana. ⁴⁹ We thus conducted "a more detailed examination of the right to privacy and the relevancy of where the right is exercised." ⁵⁰ This examination led us to conclude that **HN20** because of the distinctive nature and importance of the home, Alaskans have a fundamental "right to privacy in their homes." ⁵¹ We concluded that this fundamental right to privacy in the home encompassed "the possession and ingestion of substances such as marijuana," subject to two important limitations: First, the use or possession must be limited to "a purely personal, non-commercial context in the home"; and second, the right "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." ⁵²

The Eagles urge us to extend this reasoning to the ingestion of tobacco within their Aerie facility. We decline to do so because the Aerie facility is not a home and because smoking tobacco within the Aerie facility does not occur in "a purely personal, non-commercial context."

Our decision in *Ravin* does not invalidate the ordinance at issue here because [**26] a private club is not a home. The Eagles argue that "*Ravin* does not set up a dichotomy between 'homes' and 'everywhere else' " but instead recognizes a spectrum of location-based privacy rights, with possession or ingestion within a private home at one end. ⁵³ Our conclusion in *Ravin*, however, made clear that **HN21** the right to possess and ingest certain substances encompassed by the right to privacy was strictly limited to a "purely personal, non-commercial context in the home." ⁵⁴ It is the "distinctive nature" of an individual's home that we have recognized as deserving of special protection. ⁵⁵

For this reason, the Eagles' arguments that the Aerie facility is "an extension" of the members' homes and "has many attributes of a home" are not persuasive. A home is a private residence. Private clubs, including the Aerie

⁴⁶ *Id.* at 502.

⁴⁷ 574 P.2d 1, 12 (Alaska 1978).

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

⁴⁹ *Ravin*, 537 P.2d at 502.

⁵⁰ *Id.*

⁵¹ *Id.* at 504.

⁵² *Id.*

⁵³ See *Ravin*, 537 P.2d at 502-03.

⁵⁴ *Id.* at 504 (emphasis added).

⁵⁵ *Id.* at 503.

facility, are not homes. The Aerie facility is owned by a non-profit corporation organized under the laws of Alaska; it sells liquor and holds a liquor license that subjects it to the State of Alaska's comprehensive regulations for the sale of alcohol; and it employs five people, including a designated [*27] business manager.

Furthermore, when members of Aerie 4200 smoke tobacco in the Aerie facility, they are not ingesting that substance in a "purely personal, non-commercial context."⁵⁶ Aerie 4200 could choose not to sell alcohol in the Aerie facility. But Aerie 4200 functions as both a social club and a commercial enterprise that conducts activities "intended to produce a financial base." The fact that Aerie 4200 uses its revenue to support charitable [*358] causes does not change the commercial nature of its Aerie facility. Because the Aerie facility is not a home and operates in a commercial context, it does not fall under the privacy protections established in *Ravin*.

3. The ban on smoking in private clubs bears a close and substantial relationship to the legitimate state purpose of protecting the public health.

Because the ban on smoking in private clubs does not implicate a fundamental aspect of the right to privacy, we do not evaluate the ban under strict scrutiny. Instead, we apply the less stringent test of whether the City has demonstrated a legitimate interest in protecting the public health and welfare and a close and substantial relationship between that interest and the [*28] ban on smoking in private clubs.⁵⁷

The superior court found that "[t]he toll of death and injury caused by consumption of tobacco is not subject to serious dispute," and the amicus brief filed by the American Cancer Society discusses in detail the "harmful effects of exposure to second-hand smoke and the beneficial impact of smoke-free legislation." The Eagles do not dispute these health claims and concede that there is a legitimate state interest in enacting "a broad smoking ban in places where the public may be found, such as bars and restaurants."

The Eagles argue, however, that there is not a close and substantial relationship between protecting the public from the harmful effects of tobacco smoke and banning smoking in their private club. The Eagles emphasize that their club rule allowing smoking was adopted by a unanimous vote; that 85% of Aerie 4200's members, including all five of its employees, are smokers; and that the Aerie facility does not allow smoking when it opens to the general public a few times each year. From the perspective of the Eagles, this demonstrates that the ban on smoking in private clubs has no relationship [*29] to the welfare of the "general public," let alone a close and substantial one, but instead applies only to "private and consenting adults." The Eagles essentially claim that they have the right to engage in conduct which harms only themselves.

We rejected a similar argument in *Sampson v. State*, which held that the right to privacy does not include a right to physician-assisted suicide.⁵⁸ In *Sampson*, we explained that **HN22** our cases do not support the argument "that the government may not abridge any aspect of personal privacy unless it involves conduct posing a threat of harm to another."⁵⁹ Our decision in *Sampson* also rejected the argument that the state cannot regulate conduct that poses a threat of harm to others if the potential victims consent to the harm.⁶⁰ The Supreme Judicial Court of Massachusetts rejected a similar argument in *American Lithuanian Naturalization Club v. Board of Health of Athol*,

⁵⁶ *Id.* at 504.

⁵⁷ See *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

⁵⁸ 31 P.3d 88.

⁵⁹ *Id.* at 95; see also *State v. Erickson*, 574 P.2d 1, 21 (1978) [*30] ("**HN23** No one has an absolute right to do things in the privacy of his own home which will affect *himself* or others adversely.") (emphasis added).

⁶⁰ *Sampson*, 31 P.3d at 95 (finding that **HN24** "a physician who assists in a suicide undeniably causes harm to others" even with the patient's consent).

holding that there was a rational connection between the state's interest in public health and the ban on smoking in private clubs, particularly given the exposure of non-smoking club members to second-hand smoke.⁶¹

All of Aerie 4200's members, including the smokers and the non-smokers, are harmed by exposure to second-hand smoke in the enclosed space of the Aerie facility. Their consent does not change the analysis of the City's interest in protecting their health. As the superior court observed:

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 [*359] a smoking zone, then everyone present has chosen to be there knowing there is smoke.

The City has a legitimate interest in protecting the public, non-smokers and smokers alike, from the well-established dangers of second-hand tobacco smoke. Aerie 4200 has elected to obtain a state-regulated liquor license [**31] and sell alcoholic beverages in its Aerie facility. Establishments that offer alcoholic beverages for sale are likely to be places where members of the public frequently gather. Therefore, the City's decision to ban smoking in any enclosed place that offers food or alcohol for sale, including private clubs, bears a close and substantial relationship to the public health.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the superior court's order granting summary judgment to the City and Borough of Juneau.

⁶¹ See 446 Mass. 310, 844 N.E.2d 231, 238-39 (Mass. 2006).