IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

DOWNTOWN BAR AND GRILL, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 10-C-822**
	)	
STATE OF KANSAS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Nature of the case

In the 2010 legislative session of the Kansas legislature, the Kansas legislature passed House Bill 2221, which effective July 1, 2010, imposed a state wide smoking ban, but left in place the authority of cities and counties to maintain or enact more stringent local legislation. K.S.A. 21-4013. Where heretofore, in the absence of more stringent local legislation, smoking in public places was prohibited, except that those in charge of public places, principally being defined as indoor areas open to the public or used by the general public, had the power to designate certain areas within such public places as designated smoking areas with certain restrictions. (K.S.A. 2009 Supp. 21-4009 through

21-4011).

Among the changes, as relevant here, H.B. 2221 eliminated the authority of those in charge of public places to designate smoking areas within those particular public places. The definition of public places did not materially change (H.B. 2221 § 2(n)). Rather, the legislature banned smoking in enclosed areas (or public meetings), then went on to name, but without limitation, public places, common areas, and certain common means of transportation, especially noted up to 80 percent of hotel/motel rooms, all building access points and any place of employment (H.B. 2221 § 3(a)). Separately, the legislature gave those in charge of adult care homes or a medical care facility the power to designate a smoking area immune from the earlier noted provisions. Also, separately, and in as relevant here, the legislature made the following further exemptions:

> "(d) The provisions of this section shall not apply to . . . (4) the gaming floor of a lottery gaming facility or race track gaming facility, as those terms are defined in K.S.A. 74-8702, and amendments thereto; . . . (8) a class A or class B club defined in K.S.A. 41-2601, and amendments thereto, which (A) held a license pursuant to K.S.A. 41-2106 *et seq*., and amendments thereto, as of January 1, 2009; and (B) notifies the Secretary of Health and Environment in writing, not later than 90 days after the effective date of this act, that it wishes to continue to allow smoking on its premises; and (9) a private club in designated areas where minors are prohibited."

H.B. 2221 § 3(d)(4), (8) and (9).

The Plaintiff in this case Downtown Bar and Grill, L.L.C., is licensed as a class B club, situated in Tonganoxie, Kansas, a city in Leavenworth County, which L.L.C. was first licensed on May 4, 2009. Plaintiff has further proffered that prior thereto, this bar

and grill was licensed as a "drinking establishment" as defined by the Kansas liquor laws, K.S.A. 41-2601 *et. seq.*, which statutes derive their authority from article 15, section 10 of the Kansas Constitution. Because of Plaintiff's inability to generate 30 percent of revenue from food service as required by Leavenworth's elective option under article 15, section 10(c) of the Kansas Constitution for liquor by the drink in public places, Plaintiff elected to switch its licensure to that of a class B club, which is not subject to such a restriction within the mandate of article 15, section 10(c). *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748 (1965).

Further, it is not proffered that the City of Tonganoxie or Leavenworth County have enacted local legislation more restrictive than that imposed by H.B. 2221. Plaintiff asserts that it has been economically disadvantaged because of the existence of class B clubs licensed prior to January 2, 2009, which exist within a 30 mile radius of its club within Leavenworth County and whose patrons can continue to smoke after July 1, 2010. Plaintiff professes that its patrons, at least to a substantially economic effect, will abandon its business because of the ban of H.B. 2221 applied to its business or stay home. The claim is a denial of equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of the United States and sections 1 of the Bill of Rights to the Kansas Constitution. Plaintiff asks that the Court declare unconstitutional, and hence sever, the second clause of section 3(d)(8) of H.B. 2221, which imposes a pre-licensure date of January 1, 2009, and before for exemption, thus folding its L.L.C.

into a resulting exempt class of all class A and B clubs.

The proposed Intervenors in this case fall into two groups. The first group is represented by Paul Weigand, d/b/a Shooters and the Phoenician Room, Inc., d/b/a H.E.A.T. are proffered to be licensed "drinking establishments" situated in Wichita, Sedgwick County, Kansas, which effective July 1, 2010, will fall within the ban of H.B. 2221 for lack of an exemption thereunder.

The Phoenician Room, Inc., d/b/a H.E.A.T. is also described to be a "hookah bar," which employs use of particular smoking devises as part of its customer appeal. Affidavits are proffered which purport to assert the customers' entitlement to smoke, but also generally claim a loss of income that will follow by customers abandoning their business for businesses exempt from the ban.

Further, the other group of proposed Intervenors are Marvin Andrews, d/b/a Bingo Palace, and Bingo Royale, L.L.C., likewise situated in Wichita, who are solely licensed to offer not-for-profit bingo games as authorized under the licensure authority of K.S.A. 79-4701 *et seq*. as authorized by article 15, section 3(a) of the Kansas Constitution.

These Intervenors proffer generally that the character of their businesses cannot be distinguished materially from those of casinos, which by section (d)(4) of H.B. 2221, have had their gaming floor of a lottery gaming facility exempted, but not these businesses' gaming areas. Intervenors generally proffer a loss of business as a result and assert their patrons' rights to smoke. As did the earlier named Intervenors, these

Intervenors urge constitutional violations of equal protection and assert their constitutional right to association and other privileges and immunities.

All these Intervenors ask that H.B. 2221 be declared unconstitutional, in toto, because of the asserted constitutional violations and assert severance is impractical.

Conclusions of Law

Probably, the best first discussion is what this case is not about. It is not about whether the act of smoking should be banned in whole or in part, or whether the concerns of, and the apparent majority of, legislators in this state about the deleterious effects of smoking and second-hand smoke is correct or incorrect, in whole or in part or to any degree.

It is not about individual smokers' rights as no smokers are identified in these pleadings but, rather, is about the rights of those businesses, profit or nonprofit, whose businesses accommodate those who do smoke by permitting smoking. Rather, this case is solely about whether the exercise of power by the legislature in granting exemption from its effect to some and not others for a smoking ban meets constitutional muster. Whether the exemptions are wise or unwise, short sighted or prescient, fair or unfair, well-intended or spitefully imposed is not part of the debate or issue before the Court.

The Court is satisfied from the limited evidence in this case that the Plaintiff and the Intervenors will likely suffer economic injury that is irreparable at least in the short term and, further, that no probable legal remedy exists to recoup business lost if such were

to occur or to cushion any impact on the current value of their businesses. Certainly, the hopes and expectations of Plaintiff and Intervenors have taken a hit from H.B. 2221 and, when effective, will require choices to be altered and business decisions to be made. Whether their respective business acumen can suffer the change and prosper from it is unknown. Certainly, the Intervenor, "hookah bar," as a business concept, would yield to H.B. 2221. Equally the Court can accept for the purposes of this opinion that the harm to Plaintiff by its failure to be exempted probably outweighs that of the public benefit to be received by their non-exemption, its clientele having chosen its private confines in limited voluntary association. Intervenors' evidence on losses is modest at best.

In other words, Plaintiff has brought forth a prima facia showing in all respects but one of an entitlement to a temporary injunction. Several factors go into such a decision. *Steffes v. City of Lawrence*, 284 Kan. 380, 395 (2007); *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459 (1986).

> "We also take this opportunity to clarify Kansas precedent. In *Board of Leavenworth County Comm'rs v. Whitson*, 281 Kan. at 683, 132 P.3d 920, the court listed four requirements for obtaining a temporary injunction:
>
> '"(1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the

movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest." [Citations omitted.]'

"There, we observed that our past language in factor one concerning 'will suffer irreparable injury' had been incorrectly interpreted to require *virtual certainty* rather than a reasonable probability. *Whitson*, 281 Kan. at 683, 132 P.3d 920. In correcting the error, we stated: 'Kansas case[s] that ha[ve] cited the *Wichita Wire* language to demand proof of the *certainty* of irreparable harm rather than the mere probability of it have set too high a standard for parties seeking injunctions.' 281 Kan. at 684, 132 P.3d 920. According to *Whitson*, only a reasonable probability is necessary.

"Before *Whitson's* discussion of these four requirements, however, it did not indicate that the plaintiff must first establish a substantial likelihood of success on the merits. Thus, while *Whitson* clarified one part of *Wichita Wire*, it did not specifically acknowledge that *Wichita Wire* still validly required showing a substantial likelihood of success. Today we affirm this required showing from *Wichita Wire* for obtaining a temporary injunction and establish the required showing of actual success on the merits for obtaining a permanent one."

Steffes v. City of Lawrence at pp. 395-396.

Further, whether an injunction should issue is largely imbedded in the discretion of the Court, given that appellate review is judged by an abuse of discretion standard. *Board*

of Leavenworth County Comm'rs v. Whitson, 281 Kan. 678, 683 (2006). Nevertheless, an injunctive remedy rests in preservation of the status quo or is to operate in the future. *Franks v. State Highway Commission*, 182 Kan. 131, 136 (1957).

The question here is the extent of the legislature's power to make exemptions in an area here considered to be within the authority to legislate, i.e. the regulation of smoking. While Plaintiff asks for rational scrutiny of this legislation on a heightened basis and Intervenors argue in some respects for stricter scrutiny based on fundamental rights, it seems clear that no case supports the elevation of review of this legislative act of exemption beyond that of mere rational scrutiny. Given the accession that smoking can be restricted for reasons of public health and welfare, it can hardly be maintained that one has a personal right to smoke in the presence of others at the smoker's choice, regardless of the preference of those others present.

In *Farley v. Engelken*, 241 Kan. 663 (1987), cited by Plaintiff as demonstrative of the scrutiny to be used, section 18 under the Kansas Bill of Rights providing for a right to remedy was implicated. *Id*. at 671. That Kansas Bill of Rights is not here involved. A fair prognosis for the view to be taken may be stated as follows:

> "Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person of property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, it is well settled that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and if it is not unreasonable or arbitrary.

> "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public, and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them."

Grigsby v. Mitchum, 191 Kan. 293, 302 (1963) (emphases added).

Further, the United States Supreme Court has recognized that "reliance interests" are rational, i.e., legitimate expectations, and will support classifications. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Nordlinger v. Hahn*, 505 U.S. 1 (1992); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). Economic concerns as well support classifications. *E.g., Flamingo Paradise Gaming, L.L.C. v. Chanos*, 217 P.3d 546 (2009); *Coalition for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251 (D. Col. 2006).

Accordingly, the federal view of equal protection is consistent with the Kansas view:

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966), in such economic areas, adopting regulations

> that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g., Williamson v. Lee Optical Co.,* 348 U.S. 483, 488-489, 75 S. Ct. 461, 464-65, 99 L. Ed. 563 (1955)."

Dukes, 427 U.S. at 303.

Further, other particularly state considerations apply here in evaluating the State's power in the areas impacted and raised here by H.B. 2221's state-wide smoking ban. As noted earlier, the State's control over the distribution and sale of alcoholic beverages is plenary even to the extent of excluding federal constitutional–14th Amendment–principles. *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748 (1965). This arises by virtue of the 21st Amendment to the Constitution of the United States repealing prohibition in the United States and assigning liquor control to the individual states of the union. Control over how, when, and to whom, and under what circumstances alcoholic beverages are served is governed in Kansas by article 15, section 10 of the Kansas Constitution. Article 15, section 10 gives no individual rights. This section of our state constitution clearly is plenary. It is, of course, subject to the Kansas Constitution's equal protection clause, but certainly only rational scrutiny is the standard, with due deference to the constitutional power given the Kansas legislature by this section.

Accordingly, the Court would have to believe that the nuances separating different modes for the distribution of alcohol and how, where, and under what circumstances it is dispensed is surely within the legislature's power. Accordingly, H.B. 2221's exemption distinctions between "drinking establishments," which are of relatively recent vintage and

equate at the far end of what essentially under previous versions of article 15, section 10 were open saloons, and class A and B clubs, which have been part of the Kansas liquor law landscape for over 40 years under earlier versions of article 15, section 10, surely prohibit any meaningful state equal protection concerns as between the two classifications. Further, historical review supports that the fundamental distinctions between the two noted classifications is that private clubs serving alcohol have always been restricted, exclusive, membership only, and never open to the general public.

Accordingly, in terms of this case, the Wichita Intervenors a/k/a "Shooters" and "H.E.A.T." respectively, being drinking establishments, can claim no equal protection violation in relation to any other differently classified establishment dispensing alcoholic beverages.

Plaintiff's complaint is directed to the terms of the class A and class B club exemption, indicated as stated in section 3(d)(8) of House Bill 2221;

> "(8) a class A or class B club defined in K.S.A. 41-2601, and amendments thereto, which (A) held a license pursuant to K.S.A. 41-2606 *et seq.*, and amendments thereto, as of January 1, 2009; and (B) notifies the secretary of health and environment in writing, not later than 90 days after the effective date of this act, that it wishes to continue to allow smoking on its premises."

Plaintiff says the distinction made, being the licensing date for exemption as applying only to those clubs holding a license on January 1, 2009, creates an unconstitutional, irrational distinction between them and its club which was not licensed until May 4, 2009.

While one cannot probably quibble too greatly with a grandfather clause, which as in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), a grandfather clause went back eight years to bar street vendors in New Orleans who held their licenses subsequent was sustained. "Reliance interests" coupled with the city's purposes to substantially clear the street of vendors sustained that clause.

However, here, though clearly the elimination of smoking, at least in non-private places was the principal object of H.B. 2221, it nevertheless did faithfully and religiously and even to the de minimis degree of $10 and 10 days and "good moral character" for membership in a class B club, honor a person's choice of smoking in non-public, voluntarily associational, club-like places and the choice of others to associate with them in such atmospheres by maintaining memberships.

Class A and class B club licenses in 2009 were issued on an annual basis, the period of licensure running from issuance for one year. K.S.A. 41-2629. Thus, in the circumstances here, a class B club license applicant for a new club license could have gained one on the last business day of 2008; whereas, anyone obtaining one thereafter, including Plaintiff, would not have the benefit of the same license with the same privileges at the same cost as the late 2008 new licensee. Licenses, of course, are also renewable, once obtained.

While the State says "reliance interests," i.e. reasonable business expectations, support this cut off, the reliance interests in the example above seem spurious at best. In

the *Dukes* case deciding eight years established reliance makes sense, particularly in the context of substantially ridding the streets of New Orleans of vendors, but claiming here reliance interests support differences of merely a few days or a few months seems improbable as a premise for rational legislative choice. What more likely seems to be the case is that the occurrence arises from a history of the substance of the text for H.B. 2221, which text was inserted in H.B. 2221 by the Senate in 2009 and passed. See Senate Journal, page 382, 392 (March 19, 2009). The substance of this text had originated from 2009 Senate Bill 25. The House eventually non-concurred in H.B. 2221. See House Journal, page 486 (April 1, 2009). Thus, in a bill drafted and intended for passage in 2009 to carry a cut-off date for the grandfathering of class A and class B clubs as of the beginning of that year when the bill was intended to be passed that year seems rational in assuring or preventing a rush to club status by, for example, "drinking establishments."

However, as noted, the bill was not passed in 2009, but rather was resurrected and reenrolled on February 26, 2010. Counsel associated with Intervenors indicated it then passed the Kansas House of Representatives on a procedure providing for no amendments. Thus, what had been intended in 2009 and had "died" and which provided a short window for grandfathering class A and class B club status became one of over one year by the 2010 passage.

While citizens are deemed to know the law, they are not deemed to know what their legislature is doing. Thus, to consider the basis for the distinction, represented by the

exemption date, as justifiable as a more or less "put on notice" provision is not a fair or rational assumption. The result is the January 1, 2009, cut off for class A and class B exemption from the state wide smoking ban seems, at best, an unintended consequence, and nevertheless, wholly arbitrary because this particular date, other than by its existence, finds no rational basis for its selection. Accordingly, until this aspect of the ban is further examined, a temporary injunction should issue in favor of Plaintiff, Downtown Bar and Grill, L.L.C., and against the State of Kansas, prohibiting enforcement of H.B. 2221 and the statutes amended thereby against the Downtown Bar and Grill, L.L.C., its onsite employees, its onsite agents, or its onsite patrons effective forthwith on the filing of this Order with the Clerk of this Court.

The authority for gambling in Kansas, like the dispensing of alcoholic beverages, is also of state constitutional origin. Kansas Constitution, article 15, sections 3 through 3c. The authority for bingo games derives from a different section (*Id*. at section 3a) than that for pari-mutuel wagering (*Id*. section 3b) or casino gambling (*Id*. at 3c). Like its authority over alcohol, the State's authority over gambling is also plenary. Who, what, where and under what circumstances is legislatively controlled and probably absolute over bingo, pari-mutuel wagering, and casino gambling in the way the Kansas constitution is implemented. The Kansas Constitution implements each separately. Therefore, it seems not astounding nor any basis for an equal protection complaint that the legislature may elect for reasons it chooses, to treat such gambling activities differently in many respects.

Here Intervenors d/b/a "Bingo Palace" and Bingo Royale, Inc., argue that what is good for casinos is good for bingo parlors as well. The legislature, as did the drafters of the Kansas Constitution, has thought otherwise. In terms of Kansas' Bill of Rights, section 1's equal protection standard, exemption distinctions made by H.B. 2221, where casinos and horse and dog pari-mutuel gambling permit smoking in limited areas whereas bingo parlors are not, seemingly can be explained. Clearly, horse and dog racing and casino gambling clientele, including access to certain gambling areas, cannot be compared to bingo parlors. No prohibitions exist to exclude minors from bingo parlors, only playing bingo games (K.S.A. 79-4706(n)). Whereas, with the exception of an employee of at least 18 years of age, no person under 21 is permitted in those areas of casinos or pari-mutuel tracks where gambling takes place. (K.S.A. 74-8757(j)). Further, no one under 21 may play or wager (K.S.A. 74-8757(b); K.S.A. 74-8758(b)). Criminal penalties for the host facilities and employees are established for any violations.

Thus, one rational reason for the distinction is the presence of minors at the respective bingo facilities who might be exposed to second-hand smoke. An additional reason, as noted by the State, is the difference in the amount of State revenues received from each and a belief by the legislature that probably banning smoking totally in State-owned casinos would impede revenue generation. Further, it is to be noted that the Kansas Expanded Lottery Act, (K.S.A. 74-8733 *et seq*.) invites proposals to operate State casinos, which may well place emphasis on such entities' opinions or recommendations in

regard to the revenues available concerning the availability of smoking. The legislature may well have believed the pool of applicants would be reduced by totally banning smoking at State-owned casinos.

Accordingly, given the source of legislative authority, its plenary nature, the potential differing clientele, and the economic stakes held by the State of Kansas, a rational basis test provides no constitutional equal protection basis, federal or state, to override the decision of the legislature to exclude the Intervenors' bingo organizations from the smoking ban imposed by H.B. 2221.

Lastly here, notwithstanding the fact the Court has discussed the proposed Intervenors' petition and considered their claims, actual intervention in this proceeding seems clearly permissive. (K.S.A. 60-224(b)). Further it is obvious that temporary injunctive relief is not to be granted them here, no evidentiary hearing was held, one Intervenor is involved in a proceeding in Sedgwick County District Court (Case No. 10-CV-2522), and other arguments in opposition to H.B. 2221 may be available to the proposed Intervenors.

Accordingly, the Court will allow the proposed Intervenors to withdraw their petition for intervention if they so choose within ten days of this filing. Otherwise intervention will be granted and their claims will be dismissed for failure to state a claim pursuant to K.S.A. 60-212(b)(6) by separate order incorporating this Opinion by reference.

ORDER

For all the reasons heretofore expressed, a temporary injunction is issued in favor of Plaintiff, the Downtown Bar and Grill, L.L.C., its on-site employees, its on-site agents, and its on-site patrons and against the State of Kansas prohibiting enforcement of H.B. 2221, the effect of which exempts them from its tenants pending further order of the Court. A final decision as to the proposed Intervenors' petition is deferred. This order shall be effective when filed with the Clerk of this Court.

IT IS SO ORDERED this 30th day of June, 2010.

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Signed Franklin R. Theis, District Judge, Division Seven.