

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

BIG JOHN BILLIARDS, INC.,)
 a Nebraska corporation,)
)
)
 Plaintiff,)
)
)
 vs.)
)
 CITY OF OMAHA, a political subdivision)
 of the State of Nebraska,)
)
)
 Defendant.)

Doc. 1084 No. 553

**ORDER ON PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT**

This matter comes before the Court on Plaintiff Big John Billiards, Inc.'s ("Plaintiff") motion for summary judgment. A hearing was held March 16, 2009. Parties appeared by counsel. Arguments were heard, evidence adduced, briefs submitted, and the matter taken under advisement. For the reasons discussed below, Plaintiff's motion is granted in part and denied in part.

Facts

Defendant City of Omaha ("Defendant") is a political subdivision of the State of Nebraska. Plaintiff is a Nebraska corporation engaged in the retail sale of liquor and the operation of a pool hall within the City of Omaha. On June 20, 2006, the Omaha City Council adopted Ordinance Number 37412 ("the Ordinance"), which was subsequently signed by the Mayor. The Ordinance was codified at Article VIII of Chapter 12 of the Omaha Municipal Code. The Ordinance banned smoking in certain establishments while creating temporary and permanent exemptions outside the ban. Certain types of businesses were temporarily exempted from the smoking ban until May 14, 2011. Other

areas, including private residences, certain hotel and motel rooms, and tobacco only retail outlets were permanently exempted from the ban.

At the time the Ordinance was adopted, Plaintiff was temporarily exempted from the smoking ban because it constituted a keno location. Thus, pursuant to the Ordinance as previously written, Plaintiff's business establishment would not have been subject to the smoking ban until May 14, 2011. Subsequent to the Ordinance's adoption, however, it was challenged in the Douglas County District Court in *Hug v. City of Omaha*. In *Hug*, an individual owning a business subject to the smoking ban and not in the class of temporarily exempt businesses brought an action seeking to have the temporary exemptions declared unconstitutional. The District Court entered summary judgment in favor of the City of Omaha. The Nebraska Supreme Court reversed this decision in an opinion entered May 30, 2008 and remanded the case with instructions. *See Hug v. City of Omaha*, 275 Neb. 820, 749 N.W. 2d 884 (2008). Pursuant to mandate by the Supreme Court, the District Court found the temporary exemptions unconstitutional and severed them from the remainder of the Ordinance. The balance of the Ordinance remained in full force and effect. The Omaha City Council has not subsequently amended the Ordinance.

On June 20, 2008, Plaintiff filed a complaint and application for temporary restraining order, temporary and permanent injunction and declaratory judgment. Plaintiff asked that the Ordinance be declared unlawful and unenforceable because it was superseded by state law and because it was unconstitutional. Plaintiff further sought a temporary injunction pending resolution of the case and a final order by this Court. The motion for temporary injunction came on for a hearing on July 15, 2008. In an order filed September 5, 2008, the Court denied Plaintiff's motion for temporary injunction. On

March 6, 2009, Plaintiff filed a motion for summary judgment. The motion came on for a hearing on March 16, 2009, at which time the matter was taken under advisement.

Standard of Review

Summary judgment is properly granted when the pleadings and evidence allowed in the hearing disclose no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Eicher v. Mid Am. Fin. Inv. Corp.*, 270 Neb. 370, 385, 702 N.W. 2d 792, 808 (2005). The party moving for summary judgment has the burden of producing evidence and demonstrating there are no genuine issues of material fact. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 56, 662 N.W. 2d 599, 602-03 (2003). The moving party makes a prima facie case by offering sufficient evidence to demonstrate they are entitled to a judgment if the evidence is undisputed at trial. *Cerny v. Longley*, 270 Neb. 706, 710, 708 N.W. 2d 219, 223 (2005). Once the moving party has made out a prima facie case, the burden of production shifts to the party opposing the motion. *Id.* at 710, 708 N.W. 2d at 223.

The evidence in a summary judgment motion is viewed in the light most favorable to the non-moving party. *Blinn v. Beatrice Comm. Hosp. and Health Center, Inc.*, 270 Neb. 809, 814, 708 N.W.2d 235, 242 (2006). The non-moving party receives the benefit of all reasonable inferences deducible from the evidence. *Id.* Even when there are no conflicting facts, summary judgment should not be granted if the ultimate inferences drawn from the facts are unclear. *Gilbert v. City of Tekamah*, 221 Neb. 614, 379 N.W. 2d 758 (1986). Summary judgment is not proper when the credibility of evidence is a factor. *Blome v. Hottell*, 200 Neb. 528, 531, 264 N.W. 2d 424, 425 (1978). Thus, if a factual issue depends on a witness' credibility, summary judgment will not be

granted and the case must go to trial. *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 336-37, 622 N.W. 2d 684, 687 (2001).

Discussion

Plaintiff has filed a motion for summary judgment seeking to have Omaha Mun. Code, ch. 12, art. VIII, §§ 12-160 to 12-172 declared unconstitutional. Plaintiff's motion essentially asks the Court for two things: first, to find the permanent exemptions found at § 12-165 unconstitutional; and second, to make a determination that the permanent exemptions cannot be severed from the Ordinance, thus invalidating the entirety of the Ordinance.

The Ordinance prohibits smoking "in all enclosed Public Gathering Places within" the City of Omaha. *Omaha Mun. Code*, ch. 12, art. VIII, § 12-162. Plaintiff argues that the permanent exemptions in the Ordinance are unconstitutional, based on the reasoning of the Nebraska Supreme Court in *Hug v. City of Omaha*. Furthermore, Plaintiff asserts that the permanent exemptions are not severable from the rest of the Ordinance, and that the entire Ordinance must fail.

Plaintiff asks the Court to find the entire Ordinance unconstitutional. However, Plaintiff does not attack the Ordinance as a whole; rather, Plaintiff's objection is to the Ordinance's permanent exemptions.

"Notwithstanding any other provision of this article to the contrary, the following areas shall be exempt from the provisions of Section 12-163 and 12-164:

1. Private residences, except when used as a licensed childcare, an adult day care or Health Care Facility.
2. Hotel and motel rooms that are rented to guests and are designated as smoking rooms: provided, however, that not more than twenty percent (20%) of rooms rented to guests in a hotel or motel may be so designated. All smoking rooms on the

same floor must be contiguous and smoke from these rooms must not infiltrate into areas where Smoking is prohibited under the provisions of this Article. The status of rooms as Smoking and nonsmoking may not be changed except to add additional nonsmoking rooms.

3. Private and semiprivate rooms in nursing homes and long-term care facilities that are occupied by one (1) or more persons, all of whom are smokers and have requested in writing to be placed in a room where Smoking is permitted; provided that smoke from these places does not infiltrate into areas where Smoking is prohibited under the provisions of this Article.
4. Outdoor areas of places of employment except those covered by the provisions of Sections 12-164.
5. As part of a study conducting research into the health effects of Smoking in a scientific or analytical laboratory either governed by state or federal law or at a college or university approved by the Nebraska Coordinating Commission for Post Secondary Education. The proprietor shall post a temporary sign on all entrances to the laboratory indicating that Smoking is being allowed for the purpose of research.
6. Tobacco Only Retail Outlets that are separately housed from any entity required to be smoke free under this Ordinance are exempt from the provisions hereunder. This exemption will terminate if smoke infiltrates a nonexempt entity. Signs notifying the public that smoking is permitted in the establishment must be posted conspicuously on all entrances normally used by the public. The signs must have at least one-inch tall block lettering and be posted at a height and location easily seen by a person before entering. The signs shall say, "Smoking permitted inside."

Omaha Mun. Code, ch. 12, art. VIII, § 12-165.

1. Constitutionality of the permanent exemptions

Plaintiff asks this Court to find Omaha's smoking ban unconstitutional. In analyzing the Omaha Municipal Code, this Court will follow the same rules as those of statutory analysis. *See Nelson v. City of Omaha*, 256 Neb. 303, 311, 589 N.W. 2d 522, 527 (1999). The constitutionality of a statute or ordinance is a question of law. *Coffey v. County of Otoe*, 274 Neb. 796, 802, 743 N.W. 2d 632, 637 (2008). The burden of establishing a statute's unconstitutionality is on the party attacking its validity. *Chase v.*

Neth, 269 Neb. 882, 888, 697 N.W. 2d 675, 682 (2005). A statute is presumed constitutional, and all reasonable doubts are resolved in favor of its constitutionality. *Pavers, Inc. v. Bd. of Regents*, 276 Neb. 559, 563 (2008). "The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional." *Stenger v. DMV*, 274 Neb. 819, 824, 743 N.W. 2d 758, 762 (2008).

Plaintiff argues that the Ordinance's permanent exemptions violate the "special legislation" clause of the Nebraska Constitution, which provides in relevant part:

"The Legislature shall not pass local or special laws in any of the following cases...Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; Provided, that notwithstanding any other provisions of this Constitution, the Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto. In all other cases where a general law can be made applicable, no special law shall be enacted."

NEB. CONST. art. III, § 18. The focus of this provision is preventing legislation that arbitrarily grants "special favors" to a specific class. *Le v. Lautrup*, 271 Neb. 931, 941, 716 N.W. 2d 713, 722 (2006). This inquiry looks to the Legislature's purpose in creating the class and asks whether there is a substantial difference in circumstances suggesting the expediency of diverse legislation. *Staley v. City of Omaha*, 271 Neb. 543, 556, 713 N.W. 2d 457, 470 (2006). The Nebraska Supreme Court has explained:

"By definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary. A legislative act that applies only to particular individuals or things of a class is special legislation. General laws embrace the whole of a subject, with their subject matter of common interest to the whole state. Uniformity is required in order to prevent granting to any person, or class of

persons, the privileges or immunities which do not belong to all persons. It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted.”

Haman v. Marsh, 237 Neb. 699, 709, 467 N.W. 2d 836, 844-45 (1991) (internal citations omitted). A legislative act may constitute special legislation in one of two ways: (1) it creates an arbitrary and unreasonable method of classification; or (2) it creates a permanently closed class. *City of Ralston v. Balka*, 247 Neb. 773, 780, 530 N.W. 2d 594, 600 (1995). Plaintiff’s argument is based on the alleged arbitrariness and unreasonableness of the Ordinance’s method of classification.

Legislative classifications must operate uniformly on all within a class which is reasonable. *Gas ‘N Shop, Inc. v. Nebraska Liquor Control Comm’n*, 229 Neb. 530, 539, 427 N.W. 2d 784, 789 (1998). Exemptions are allowed when they are applicable to all persons of the same class similarly situated. *Id.* at 539, 427 N.W. 2d at 789-90.

“[T]he legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class.”

Nat’l Gas Pipeline Co. of America v. State Bd. of Equalization and Assessment, 237 Neb. 357, 370, 466 N.W. 2d 461, 470 (1991). A classification is proper if the special class has a reasonable distinction from other subjects of a like character. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 851, 620 N.W. 2d 339, 345 (2000). This distinction must bear some reasonable relationship to the legitimate purposes of the legislation. *Id.* The question is whether the persons or things classified by the act form a proper and

legitimate class with reference to the act's purpose. *Le*, 271 Neb. at 942, 716 N.W. 2d at 723.

"In other words, the legislative classification must (1) be based on some substantial difference of circumstances or situation that would indicate the justice or expediency of diverse legislation with regard to the objects classified and (2) further a public purpose."

City of Ralston, 274 Neb. at 780, 530 N.W. 2d at 600.

Plaintiff argues that Defendant has no rational purpose or justification for creating the special class of permanently exempt facilities. In making this argument, Plaintiff relies on the Nebraska Supreme Court's opinion in *Hug v. City of Omaha*. In *Hug*, the plaintiff brought an action in district court claiming that Omaha's smoking ordinance was unconstitutional. 275 Neb. at 820, 749 N.W. 2d at 886. The plaintiff argued that the ordinance's temporary exemptions were special legislation that violated the special privileges and immunities clause of the Nebraska Constitution. *Id.* at 823, 749 N.W. 2d at 888. The Nebraska Supreme Court concluded that the temporary exemptions were unconstitutional and severed them from the ordinance. *Id.* at 828, 749 N.W. 2d at 891. The Supreme Court focused its attention on the purpose stated by the ordinance: to prohibit smoking in public gathering places and in places of employment to protect public health and welfare. *Id.* at 827, 749 N.W. 2d at 890. The Supreme Court then explained:

"The stated purpose of the ordinance is to recognize the right of everyone to breathe smoke-free air in order to protect the public health and welfare. Nothing in the ordinance's stated purpose would explain why employees of the exempted facilities or members of the public who wish to patronize those establishments are not entitled to breathe smoke-free air or to have their health and welfare protected. Nor does the City offer any other admissible evidence which might support this distinction. We determine that

on the record before us, there is no substantial difference of circumstances to suggest the expediency of diverse legislation.”

Id. at 827, 749 N.W. 2d at 890-91.

Similar to the plaintiff in *Hug*, Plaintiff attacks the permanent exemptions in the Ordinance as unconstitutional special legislation. Based on the Nebraska Supreme Court's rationale in *Hug*, the Court finds this argument persuasive as to the exemptions found in Omaha Mun. Code, ch. 12, art. VIII, § 12-165 (2)-(6). The stated purposes of the Ordinance are:

“(1) to protect the public health and welfare by prohibiting smoking in public gathering places and places of employment; and (2) to guarantee the right of employees, residents, and visitors to breathe smoke free air, and to recognize that the need to breathe smoke free air shall have priority over the desire to smoke.”

Omaha Mun. Code, ch. 12, art. VIII, § 12-160. As the Ordinance makes clear, Defendant's ultimate goal was to ban smoking in public places and places of employment, not merely to separate smokers from nonsmokers or limit smoking to designated areas. *See Hug*, 275 Neb. at 832, 749 N.W. 2d at 894 (Connolly, J., concurring). In light of this purpose, the Court must decide whether there is a substantial difference in circumstances between exempted and non-exempted establishments which suggests the expediency of diverse legislation. The Court finds no such substantial difference. Defendant has failed to offer any evidence to support the distinction between establishments where smoking has been prohibited, and establishments where smoking is allowed. That is, nothing in the Ordinance's purpose explains why employees of the exempted facilities, or members of the public patronizing those establishments, are not entitled to have their health and welfare protected. Therefore, the permanent exemptions found in Omaha Mun. Code, ch. 12, art. VIII, § 12-165 (2)-(6) are unconstitutional.

The Court finds, however, that the permanent exemption found in Omaha Mun. Code, ch. 12, art. VIII, § 12-165 (1) is constitutional. This exemption covers “[p]rivate residences, except when used as a licensed childcare, an adult daycare or Health Care facility,” *Omaha Mun. Code*, ch. 12, art. VIII, § 12-165 (1). In this instance, there is a substantial difference of circumstances between private residences and the other establishments that are covered by the Ordinance. This difference is apparent on the face of the Ordinance. As noted above, the purpose of the Ordinance is “to protect the public health and welfare by prohibiting smoking in *public* gathering places and *places of employment*” and “to guarantee the right of employees, residents, and visitors to breathe smoke free air.” *Omaha Mun. Code*, ch. 12, art. VIII, § 12-160 (emphasis added). A *private* residence is plainly not a public gathering place or place of employment, which is the arena in which the Ordinance seeks to prohibit smoking. Exempting private residences from the strictures of the Ordinance comports with the Ordinance’s purpose of prohibiting smoking in public gathering places or places of employment. There is a substantial difference between exempted private residences and non-exempt establishments, and this distinction bears a reasonable relationship to the legitimate purposes of the Ordinance.

For the reasons discussed above, the Court finds Omaha Mun. Code, ch. 12, art. VIII, § 12-165 (2)-(6) unconstitutional.

2. Severability

Plaintiff next argues that the permanent exemptions are not severable from the Ordinance and that the whole Ordinance is rendered unconstitutional by their presence.

Plaintiff claims that severing the provision would amount to "judicial modification" that is contrary to the legislative intent behind the Ordinance.

The purpose of severability analysis is to save "constitutional portions of a workable, independently enforceable statutory plan after a portion of the plan has been found unconstitutional." *Duggan v. Beermann*, 249 Neb. 411, 429, 544 N.W. 2d 68, 79 (1996). The rule is that when unconstitutional provisions are so interwoven with the rest of the act that the act may not be operative with the unconstitutional provisions eliminated, the whole act fails. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 523-24, 294 N.W. 2d 330, 334 (1980). The Nebraska Supreme Court has given several factors to be considered when determining whether an unconstitutional provision in a statute is severable:

"(1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act."

State ex rel. Stenberg v. Omaha Exposition and Racing, Inc., 263 Neb. 991, 997, 644 N.W. 2d 563, 569 (2002). See also *State ex rel. Spire v. Staskiewicz*, 239 Neb. 1, 8, 473 N.W. 2d 428, 434-35 (1991). The Court will go through each of these enumerated factors below.

i. Workable, independently enforceable plan

Under severability analysis, the first and second factors examine whether a workable, independently enforceable plan remains after the invalid portion has been removed. *Duggan*, 249 Neb. at 428, 544 N.W. 2d at 79. Here, severing the

unconstitutional permanent exemptions leaves a workable, independently enforceable plan. The purpose of the Ordinance is to protect public health and welfare by prohibiting smoking in public gathering places and places of employment. Severing the permanent exemptions leaves the underlying purpose intact, and simply extends the prohibition on smoking to the small number of public gathering places and places of employment that were heretofore outside the Ordinance. Removing the unconstitutional provision in the Ordinance leaves a workable, independently enforceable smoking ban. *See Hug*, 275 Neb. at 832, 749 N.W. 2d at 894 (Connolly, J., concurring) (“the City’s exemptions have sucked the air out of an otherwise constitutional ordinance”). The Court thus finds the first two factors weigh in favor of severability.

ii. Inducement

The third factor seeks to determine whether the invalid portion of a statute was such an inducement to the valid portions that the valid portions would not have passed but for the invalid portion. *Stenberg*, 263 Neb. at 997, 644 N.W. 2d at 569. When a section of a statute constituting an inducement is unconstitutional, the entire statute must fail, even if there is a savings clause. *Laverty v. Cochran*, 132 Neb. 118, 127, 271 N.W. 354, 359 (1936). The Nebraska Supreme Court has noted that:

“Inducement as contemplated by the decisions of this court has not been clearly defined. It is thought that it may not be accurately defined but that it must depend upon the character and quality of the action of the Legislature as it appears in the legislation under scrutiny.”

Fitzgerald v. Kuppinger, 163 Neb. 286, 294, 79 N.W. 2d 547, 553 (1956). In making the determination of whether the permanent exemptions were an inducement to passage of

the Ordinance, the Court looks to the Ordinance's legislative history. *See Jaksha v. State*, 241 Neb. 106, 129, 486 N.W. 2d 858 (1992).

Plaintiff has offered into evidence transcripts of city council hearings and public hearings held prior to enactment of the Ordinance. Plaintiff has highlighted certain portions of the transcripts it claims shows the Ordinance was the product of a compromise, and would never have passed as a total ban. However, these transcripts never mention the permanent exemptions, and whether the inclusion of these exemptions was a necessary inducement towards passage of the Ordinance.

Plaintiff has also offered the depositions of every Omaha City Council member who voted on the Ordinance. Based on *Hug*, however, the Court has not taken these depositions into consideration. In *Hug*, the Nebraska Supreme Court determined that two post-enactment affidavits of City Council members did not qualify as legislative history, 275 Neb. at 824, 749 N.W. 2d at 889. Plaintiff contends that since they have deposed the entire City Council, rather than just two members, the depositions should be considered. The Court does not agree. The Nebraska Supreme Court defined legislative history as "the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debate." *Id.* The Supreme Court further stated:

"We see a distinction between legislative history made contemporaneously with the passage of legislation and statements made subsequently to the passage of legislation. In discussing the latter, the U.S. Supreme Court has noted that postenactment views form a hazardous basis for inferring the intent behind a statute."

Id. at 824-25, 749 N.W. 2d at 889. That Plaintiff has offered the views of the entire City Council, as opposed to the mere two members in *Hug*, does not change the fact that these are post-enactment views. Indeed, the Ordinance was passed on June 20, 2006; Plaintiff's

depositions were taken in December 2008. Thus, the views of the Council Members come some two-and-a-half years after passage of the Ordinance. This does not comply with the Nebraska Supreme Court's notation that legislative history is "made contemporaneously with the passage of legislation." *Id.* at 824, 749 N.W. 2d 889. Therefore, the Court has not taken these post-enactment declarations into consideration. Moreover, as discussed above, the legislative history does not tend to show that the permanent exemptions induced passage of the Ordinance. The Court thus finds this factor weighs in favor of severability.

iii. Intent of the legislature

The fourth factor asks whether severance will do violence to the intent of the legislature. *Stenberg*, 263 Neb. at 997, 644 N.W. 2d at 569. In this case, the intent of the legislature was to "protect the public health and welfare by prohibiting smoking in public gathering places and places of employment" and "to guarantee the right of employees, residents, and visitors to breathe smoke free air." *Omaha Mun. Code*, ch. 12, art. VIII, § 12-160. Removing the permanent exemptions and placing those establishments within the ambit of the overarching smoking ban does not do violence to this intent. To the contrary, it comports with the Ordinance's stated intent to protect the public health and ensure smoke free air in public gathering places and places of employment. The Court thus finds this factor weighs in favor of severability.

iv. Declaration of severability

The final factor looks at whether there is a declaration of separability indicating the legislature's willingness to enact the bill absent the invalid portion. *Stenberg*, 263 Neb. at 997, 644 N.W. 2d at 569. A severability clause is an aid to interpretation, and

declares the legislature's intent that it would have passed an act with the invalid parts omitted. *State ex rel. Meyer v. Duxbury*, 183 Neb. 302, 310, 160 N.W. 2d 88, 94 (1968).

While not determinative, this factor "gives deference to any declaration of separability which would indicate that the Legislature would have enacted the bill absent the invalid portion." *Duggan*, 249 Neb. at 432, 544 N.W. 2d at 80. Here, the Ordinance contains a severability clause:

"If any provision, clause, sentence, or paragraph of this Article or the application thereof to any person or circumstances shall be held invalid, that invalidity shall not effect the other provisions of this Article which can be given effect without the invalid provision or application and to this end the provisions of this Article are declared to be severable."

Omaha Mun. Code, ch. 12, art. VIII, § 12-172. The Ordinance, in plain and unambiguous language, states a legislative intent to sever invalid portions of the Ordinance in order to save the whole. The Court thus finds that this factor weighs in favor of severability.

For all the reasons discussed above, the Court finds that the permanent exemptions in *Omaha Mun. Code*, ch. 12, art. VIII, § 12-165 (2)-(6), which the Court found unconstitutional in section (1) of this order, are severable. The remaining provisions continue to have full force and effect.

It should also be noted that the Nebraska Supreme Court found the temporary exemptions in *Hug* to be severable from the Ordinance as a whole. 275 Neb. at 828, 749 N.W. 2d at 891. The *Hug* Court relied solely on the Ordinance's severability clause in determining that the temporary exemptions at issue in that case were severable from the rest of the Ordinance. *Id.* Due to the similarities between the two cases, this Court has taken the outcome of *Hug* into account in determining that *Omaha Mun. Code*, ch. 12, art. VIII, § 12-165 is severable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Big John Billiards, Inc.'s motion for summary judgment is granted in part, and denied in part.

IT IS FURTHER ORDERED that the exemptions to Omaha City Ordinance Number 37412, found in Omaha Mun. Code, ch. 12, art. VIII, § 12-165 (2)-(6), are determined to be unconstitutional special legislation prohibited by Neb. Const. art. III, § 18.

IT IS FURTHER ORDERED that these exemptions are herewith severed from the balance of the Ordinance in accord with Omaha Mun. Code, ch. 12, art. VIII, § 12-172, and that the remaining provisions continue to have full force and effect.

DATED this 16 day of April, 2009.

BY THE COURT:



W. MARK ASHFORD
DISTRICT COURT JUDGE