

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

STEWART BAINUM, JR. and :
BARBARA BAINUM RENSCHLER :
 :
Plaintiffs :
 :
vs. : Equity No. 85397
 :
STATE OF MARYLAND and :
STATE DEPARTMENT OF ASSESS- :
MENTS AND TAXATION and :
BURNING TREE CLUB, INC. :
 :
Defendants :

OPINION AND ORDER

This is an action for declaratory and injunctive relief brought by the plaintiffs who are taxpayers and residents of Montgomery County, Maryland. The plaintiffs challenge the constitutionality of Article 81, §19(e)(4), Maryland Code, under the Maryland Constitution, and the membership policy of the defendant, Burning Tree Club, Inc. (hereinafter Burning Tree).

The primary issue, presented for the first time in this State, is whether the statutory granting of a tax deferral to a country club whose facilities are operated for the primary purpose of serving or benefitting members of a particular sex is violative of Art. 46 (The Equal Rights Amendment) of the Maryland Declaration of Rights.

THE STATUTE

In 1965, the Maryland General Assembly enacted Section 19(e) of Article 81 which provides a tax preference to country clubs. The purpose of the statute is set out in the Preamble to the Act:

"(I)t (is) in the general public interest that (country club) uses should be encouraged in order to provide open spaces and provide recreational facilities and to prevent the forced conversion of such country clubs to more intensive or different uses as a result of economic pressures caused by the assessment of country club land and improvements at a rate or level incompatible with the practical use of such property for country clubs."

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The statute authorizes the State Department of Assessments and Taxation to make agreements with country clubs regarding the assessment and taxation of their land. If a club enters into an agreement, the land is assessed on two bases: first, as a country club, and second, at its highest and best use. The taxes attributable to the higher assessment are deferred and are not payable unless the land ceases to be used as a country club, or is conveyed to a new owner unwilling to abide by the assessment, or fails to qualify under the statutory definition of a country club.

Section 19(e), as originally enacted, contained no ban against discrimination. In 1974, the General Assembly amended Section 19(e)(4), so that it now provides:

In order to qualify under this section, the club may not practice or allow to be practiced any form of discrimination in granting membership or guest privileges based upon the race, color, creed, sex, or national origin of any person or persons. The determination as to whether or not any club practices discrimination shall be made by the office of the Attorney General after affording a hearing to the club. The provisions of this section with respect to discrimination in sex do not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times.

The statute requires the Attorney General to certify that the club does not discriminate, or to certify that it is operated with the primary purpose of serving or benefitting members of a particular sex. Defendant Burning Tree qualifies for the tax deferral under the statute's primary purpose provision.

THE PARTIES

Plaintiff Stewart Bainum, Jr. is a citizen of Maryland, a resident of Montgomery County, and a member of the State Senate. He is a taxpayer and owner of residential property in Montgomery County.

Plaintiff Barbara Bainum Renschler is a citizen of Maryland and a resident of Montgomery County. She is a taxpayer and an owner of residential and commercial property in Montgomery County. She desires to become a member of Burning Tree Club.

Defendants State of Maryland and State Department of Assessments and Taxation have the responsibility for the assessment of taxes on property within the State, and may enter into agreements pursuant to Section 19(e) of Article 81.

Defendant Burning Tree Club, Inc. is a Maryland Corporation which operates Burning Tree Country Club.

Initially, the Attorney General joined with plaintiffs Bainum and Renschler as a plaintiff in this action. Defendant Burning Tree Club demurred on the grounds the Attorney General lacked the authority to bring a declaratory judgment action to attack a State statute, that the Court lacked jurisdiction because no actual, justiciable controversy existed, and finally, that the Attorney General's position in this case involved him in an irreconcilable conflict of interest. On December 8, 1983, the Hon. Calvin Sanders sustained the Demurrer of Burning Tree on the ground that the Court lacked jurisdiction to entertain the petition because there existed no justiciable controversy. The State appealed to the Court of Appeals, where the issue is presently pending.

The plaintiffs, Stewart Bainum, Jr. and Barbara Bainum Renschler jointly pray that this Court (1) declare the primary purpose provision in 19(e)(4) of Article 81 violative of Article 46 (E.R.A.), Article 15 (public purpose) and Article 24 (Equal Protection) of the Maryland Declaration of Rights, and therefore null and void; (2) enjoin the State of Maryland Department of Assessments and Taxation from granting the tax preference in accordance with the exemption in §19(e)(4); and (3) declare Burning Tree's policy and practice of denying membership and guest privileges to women violative of Article 46 and Article 24 of the Maryland Declaration of Rights and unconstitutional. Plaintiff Barbara Bainum Renschler prays that this Court (1) enjoin the club from excluding her from membership because of her sex; and (2) direct the club to receive and process her application for membership and the applications for membership of any other women desiring membership in the same manner as applications from men.

This case is before this Court on cross-motions for summary judgment.

1984 SEP 13 AM 9 58

FACTS

The parties agree that there is no dispute as to any material fact. The undisputed facts are as follows:

Burning Tree Club was founded in 1922 as an all-male golf club, located in Bethesda, Maryland. The club occupies approximately two hundred and twenty-five acres, of which two hundred acres is open space. The club consists of an eighteen-hole golf course and a one-story building.

The membership policies, as set out in the Club By-Laws, have been consistent since the founding of the club. Membership is limited to men, and to not more than two hundred and fifty residents and two hundred and fifty non-residents plus Honorary Clergy and Senior members. A person cannot apply for membership but must be proposed by one member and seconded by at least one other. Only ten to fifteen new resident members are admitted in a typical year. "The decisive criteria in every case, however, are the man's dedication to the game of golf and compatibility with the Club's members." See Affidavit of James Gibbons, Pres. of Burning Tree Club. Women are excluded from membership and guest privileges.

On December 29, 1965, Burning Tree and State Department of Assessments and Taxation entered into a contract pursuant to Art. 81, §19(e), whereby Burning Tree agreed to maintain its property as open space for ten years in return for the tax deferral. The agreement provides for an extension from time to time in accordance with Article 81. On July 24, 1975, an agreement was executed for an additional ten years, and on April 14, 1981, an agreement was executed for an additional fifty years.

In February of 1978, pursuant to the statute, the Attorney General certified that the facilities of Burning Tree were operated for the primary purpose of serving men and that the club was not discriminating on the basis of sex under Section 19(e)(4).

Burning Tree Club is the only country club ever to qualify for the open space tax preference under the "primary purpose" exemption. 31 Op. Atty. Gen'l. 220 (1983).

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In their Motion for Summary Judgment, plaintiffs contend that the "primary purpose" provision of Article 81, Section 19(e)(4) violates Article 46 (E.R.A.) and Article 24 (Equal Protection) of the Maryland Declaration of Rights because the statute sanctions and encourages discrimination on the basis of gender. Additionally, plaintiffs contend that the tax deferral scheme, particularly the certification by the Attorney General that the club's purpose is to benefit a particular sex, so injects the State into Burning Tree's membership policies that it transforms Burning Tree into a state actor. As a state actor, plaintiffs contend that Burning Tree's discriminatory membership policies violate Articles 46 and 24 of the Maryland Declaration of Rights. Plaintiffs also claim that the "primary purpose" provision of Section 19(e)(4) violates Article 15 of the Maryland Declaration of Rights. Article 15 requires that taxes be assessed and exemptions granted only "for good government and benefit of the community." Plaintiffs argue that tax exemptions for country clubs with discriminatory membership policies violates Article 15 as being contrary to public policy and the benefit of the community. Finally, plaintiffs contend that the "primary purpose" provision, if unconstitutional, is severable from Section 19(e)(4).

Defendant Burning Tree bases its Motion for Summary Judgment on six grounds. First, defendant Burning Tree contends that Article 81, Section 19(e)(4) serves a public purpose by encouraging country clubs to maintain open, green spaces. Second, Burning Tree contends that it is not violative of Articles 24 and 46. Third, Burning Tree contends that the "primary purpose" provision of Section 19(e)(4) is facially neutral and is not discriminatory because it applies equally to country clubs benefitting only men and those benefitting only women, so that no differential benefit or burden arises under the tax statute. Alternatively, Burning Tree contends that if the primary purpose provision is unconstitutional, it is not severable from the remainder of Section 19(e)(4). Fourth, Burning Tree contends that its members' constitutional rights of association would be infringed if the tax deferral benefits of Section 19(e) were denied to Burning Tree. Fifth,

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Burning Tree contends that its contract with State Department of Assessments and Taxation to maintain open spaces in return for a tax deferral would be unconstitutionally impaired, under Article I, Section 10 of the United States Constitution if this Court enjoined State Department of Assessments and Taxation from granting Burning Tree a tax deferral. Finally, Burning Tree contends that plaintiffs' suit is barred by laches.

I.

The first question to be addressed is whether Article 81, Section 19(e)(4) violates Article 46 of the Maryland Declaration of Rights. That Article, commonly known as the Equal Rights Amendment, provides:

Equality of rights under
the law shall not be
abridged or denied because
of sex.

A.

The Equal Rights Amendment prohibits sex discrimination that is imposed "under the law." All parties agree this language means the Equal Rights Amendment's prohibition applies only to State action or to private conduct that can fairly be treated as "State action." See, Motion of Plaintiffs for Summary Judgment, p. 6, and Motion of Defendant Burning Tree for Summary Judgment. Thus, the legal effect of the Equal Rights Amendment is confined to sex-based discrimination by the State itself, or by those entities or individuals whose conduct can be characterized as "State action." 68 Op. Atty. Gen'l. 77-78 (1983); 65 Op. Atty. Gen'l. 103 (1980); Junior Football Association of Orange, Texas v. Guadet, 546 S.W.2d 70 (1976 Tex). "The activities of private organizations not affected with State action do not appear to be within the ambit of Article 46." 65 Op. Atty. Gen'l. 103, 246 (1980).

That the State is responsible for the statute is beyond question. The statutory scheme obviously is the product of State action...which is subject to constitutional review and restraint. Lugar v. Edmondson, 102 S.Ct. 2744, 2754 (1982).

1984 SEP 13 AM 9 59

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The Maryland Court of Appeals has interpreted Article 46 broadly in Rand v. Rand, 280 Md. 508, 515 (1977). Chief Judge Murphy, writing for the Court, stated:

"(W)e believe that the broad, sweeping, mandatory language of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the ERA in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications." Rand, 280 Md. at 515-16, 374 A.2d at 905-05.

The Rand Court emphasized "The words of the E.R.A. are clear and unambiguous; they say without equivocation the 'Equality of rights under the law shall not be abridged or denied because of sex.' This language mandating equality of rights can only mean that sex is not a factor." Rand, 280 Md. at 512.

The "primary purpose" provision of Section 19(e)(4) specifically authorizes the tax preference for country clubs that operate their facilities primarily for the benefit of one sex --- in other words, that discriminate on the basis of sex. While on the one hand prohibiting discrimination on the basis of race, color, creed, national origin and sex, the statute on the other hand creates the privilege to fully discriminate against members of one sex and simultaneously receive a substantial tax benefit. Country clubs which only partially discriminate would not be protected under the "primary purpose" clause and would therefore lose their tax benefit. The State of Maryland, through this unusual statutory scheme provides encouragement, approval and financial aid to private discrimination. Furthermore, the statute's requirement of the certification procedure by the Attorney General distinguishes this statute from the more typical tax exemption statute and involves the Maryland State Attorney General in discriminatory practices which the E.R.A. forbids to the State. Compare, New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 859 (1975). The State cannot do indirectly what it cannot do directly.

1984 SEP 13 AM 9 59
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B.

FACIAL NEUTRALITY

The fact that the statute does not on its face discriminate against one sex, or that it does not on its face impose greater burdens or provide greater benefits to a particular sex, does not save the provisions from violating the E.R.A. The facially neutral, separate-but-equal approach has not been presented to the Maryland Courts, but has been addressed by many courts in the context of racial discrimination. A statute may be neutral on its face and still have a discriminatory effect. Hunter v. Erickson, 393 U.S. 385 (1969); Anderson v. Martin, 375 U.S. 399 (1964). The classification, although without explicit gender reference to one sex, may in reality and practice fall more heavily on one sex than the other. See, Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J., 871, 898 (1971).

The facially neutral argument in support of a statute's constitutionality was rejected by the Supreme Court in the context of race and the Equal Protection Clause of the 14th Amendment in Shelley v. Kraemer, 334 U.S. (1948) and Loving v. Virginia, 388 U.S. 1 (1967). "(T)he (racial) classifications in these statutes (were) repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." 388 U.S. at 11, N.11. "For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial of a State of the equal protection laws, in violation of the Fourteenth Amendment." Mulkey v. Reitman, 50 Cal. Repr. 881, 889 (1966) quoting Justice Frankfurter 81 S. Ct. at 863.

In Moose Lodge v. Irvis, 407 U.S. 163 (1972), a black man challenged the racially discriminatory guest policies of a private club. The State liquor board's regulations required that every club licensee adhere to all the provisions of its constitution and by-laws. The Court said:

"(the) effect of this particular regulation...would be to place State sanctions behind...(Moose Lodge's)...discriminatory membership rules...(e)ven though the Liquor Control Board regulation

1984 SEP 13 AM 9:59

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is neutral on its face, the result of its application in a case where the constitution and rules of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule."

407 U.S. 178-179.

In Hunter v. Erickson, 393 U.S. 385 (1969), the Supreme Court held unconstitutional an amendment to a city charter regulating property transactions based on race, color, religion, national origin or ancestry. The Hunter Court stated:

...although the law on its face treats negro and white, jew and gentile in an identical manner, the reality is that the law's impact falls on the minority.

393 U.S. at 391. In Anderson v. Martin, 375 U.S. 399 (1964), the Supreme Court held unconstitutional a Louisiana statute which required the Secretary of State to print the race of each candidate opposite that candidate's name on all ballots. This racial labeling provision applied equally to black and white candidates. Holding the statute unconstitutional, the Court stated that Louisiana could not do indirectly through a facially neutral statute that which it could not do directly through an express statutory prohibition barring black citizens from appearing on ballots. 375 U.S. at 404.

Similarly, in Reitman v. Mulkey, 387 U.S. 369 (1967), the Supreme Court invalidated a California constitutional amendment that prohibited the State from limiting the right of any person to "sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." *Id.* at 371. This facially neutral amendment made no reference to discrimination or classification. However, the Court found that the amendment was legislative action which authorized private discrimination. The Court agreed with the finding of the California Supreme Court that there could be "no other purpose for an application of (the amendment) aside from authorizing the perpetration of purportedly private discrimination." *Id.* at 375. The Court found:

1984 SEP 13 AM 9:59
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The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter...Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. Id. at 377.

The "primary purpose" provision of Section 19(e)(4) of Article 81 of the Annotated Code of Maryland is analogous to those facially neutral statutes struck down by the Supreme Court under the Fourteenth Amendment. Tax benefits to clubs that make distinctions on the basis of sex but not race, creed or national origin impermissibly make gender a distinguishing characteristic in the statute. Thus, sex discrimination is treated more favorably than other forms of discrimination. Under the analysis of the E.R.A. in Rand v. Rand, 280 Md. at 512 and Condore v. Prince George's County, 289 Md. at 524, the E.R.A. "can only mean that sex is not a factor."

The tax preference scheme challenged herein, which requires the Maryland State Attorney General to enforce certain country club's private rules and practices of discrimination against women in its guest and membership privileges, like the statute in Moose Lodge, places State sanctions behind the discriminatory membership rules. In order to qualify for the tax exemption, Burning Tree must adhere to its by-laws restricting membership to males --- if Burning Tree deviates and admits some women, they no longer operate their facilities primarily for the benefit of one sex. Like Moose Lodge, the actions of the State and the statute sanction the discriminatory practices of Burning Tree.

As an exception to the overall anti-discrimination clause of Section 19(e), the "primary purpose" provision can have one purpose and one effect --- to allow country clubs to discriminate on the basis of sex and make sex a factor. In reality, the "primary purpose" provision operates to exclude women and to suggest that a dual system supported by State funds is acceptable. Such interpretation would defeat the purpose and spirit of E.R.A.

Defendant Burning Tree contends its members' freedom of association would be unconstitutionally and impermissibly restricted if the "primary purpose" provision is held invalid.

1984 SEP 13 AM 9:59

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Burning Tree argues that the denial of the tax benefit would violate the United States Constitution. Private discrimination may be characterized as a form of exercising freedom of association, but it has never been accorded affirmative constitutional protection. Hishon v. King & Spalding, No. 82, 940 United States Supreme Court, May 22, 1984, p. 8; Norwood v. Harrison, 413 U.S. 455, 470 (1973). The State is not required to provide affirmative support to private discrimination.

This Court holds that the "primary purpose" provision of Article 81, Section 19(e)(4) impermissibly discriminates on the basis of gender and violates Maryland's Equal Rights Amendment, Article 46 of the Maryland Declaration of Rights. In light of this holding, it is unnecessary for this Court to determine whether the "primary purpose" provision also violates Articles 24 and 15 of the Maryland Declaration of Rights.

C.

SEVERABILITY

Having determined that the "primary purpose" provision of Section 19(e)(4) of Article 81 violates Article 46 of the Maryland Declaration of Rights (The Equal Rights Amendment), the next question is whether that invalid portion is severable from the remainder of the statute. The plaintiffs, Stewart Bainum, Jr. and Barbara Bainum Renschler, and the Attorney General contend the invalid "primary purpose" provision should be severed while the defendant, Burning Tree Club, Inc., argues that if the provision is unconstitutional, the entire 1974 Amendment to Section 19(e)(4) should fall.

Established principles of statutory construction impose a judicial obligation to sustain the constitutionality of a statute whenever possible by severing invalid clauses and permitting the remainder of the statute to stand. Davis v. State, 294 Md. 370, 383 (1982); Cities Service Co. v. Gov. O.C., 290 Md. 553 (1981); Taxpayers v. O.C., 280 Md. 585 (1977); Smith, 474 F.Supp. 1160, 1169 (S.D. Fla. 1979). The absence of a severability clause or the fact that the invalid portion is not in a separate section

1984 SEP 13 AM 9:59

HOWARD W. SMITH
CLERK OF THE COURT
MONTGOMERY, MARYLAND

does not prohibit the Court from severing the provision; People v. Mancuso, 175 N.E. 177 (1931, J. Cardozo); Borchert v. Scott, 460 S.W.2d 28, 33 (1970). Moreover, Article 1, Section 23, Severability of Provisions of Statutes, provides:

The provisions of all statutes enacted after July 1, 1973 are severable unless the statute specifically provides that its provisions are not severable. The finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent."

This section has been interpreted to mean that all statutes have a severability clause. Davis, supra at 383.

The question is whether the legislature would have enacted the valid portions of the statute with the unconstitutional portion stricken therefrom. Turner v. State, 299 Md. 565 (1984). The primary focus in questions of severability is legislative intent. The intent to be ascertained in questions of severability, however, is not the actual legislative intent but what would have been the intent of the original legislature, if partial invalidity had been foreseen. Cities Service Co. v. Governor, 290 Md. 553 (1981); Shell Oil v. Supervisor, 276 Md. 36, 48 (1975); Baltimore v. A.S. Abell Co., 218 Md. 290 (1958). When the dominant purpose of an enactment may largely be carried out, courts will generally hold the valid portions severable and enforceable. O.C. Taxpayers, supra at 601; Davis, supra at 384; Cities Service Co. at 576.

When a statute contains both a general provision and an invalid exception, courts have often refused to sever when the severed statute would impose a duty, sanction or substantial hardship on the otherwise excepted class. Cities Service Co., supra at 576.

In Turner v. State, supra, the Court of Appeals recently held a criminal statute making it unlawful to employ female sitters was violative of the Equal Rights Amendment. Severance of

1984 SEP 13 AM 9:59

HOWARD M. SMITH
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the word "Female" would make the statute applicable to both sexes. The Court held that the offensive gender-based discrimination could not be eliminated by severing the word "Female." The case is distinguishable.

Penal laws are to be strictly construed. Courts will refuse to extend a criminal law to cover groups of people excluded on the face of the law. Brown, Emerson, Falk and Freedman, supra at 914. "When discrimination is part of a criminal law, the coverage of the law is rarely if ever extended to previously exempted groups." The invalid exemption or exception cannot be severed else the coverage of the criminal law is extended.

In determining legislative intent, the circumstances under which the particular act was passed must be considered. Factors such as the history of the act, the existence of an emergency, the context of the act, and the objectives of the legislature may be weighed. Sutherland, Statutory Construction, Section 44.03 (1973).

The legislative history of the 1974 amendment to Section 19(e)(4) is limited. The affidavit of Christopher Hamlin, a legislative intern who researched the 1974 legislature's early attempts to prohibit discrimination under Section 19(e), reveals:

1. That in 1972, the General Assembly never voted on Senate Bill No. 158 (1972) because the bill was not reported out of committee, and
2. That in 1973, the General Assembly adjourned before voting on House Bill No. 790 (1973).

See Plaintiffs' Memorandum in Support of Summary Judgment, Affidavit of Christopher Hamlin and attachments. There is no evidence the General Assembly rejected these anti-discrimination bills because they lacked a "primary purpose" provision, only that they did not vote on the bills.

Any legislative history of the failed attempts to repeal the "primary purpose" provision in 1981, 1982 and 1983 has no bearing on the intent of the 1974 legislature which enacted Section 19(e)(4). It is the intent of the 1974 legislature which is dispositive. See, Baltimore v. A.S. Abell Co., 218 Md. 273, 290 (1958)(original legislative intent in enacting statute).

1984 SEP 13 AM 9:59

HOWARD M. SMITH
CLERK OF COURT
MONTGOMERY COUNTY, MD

The legislature has said that in order to qualify for the tax deferral, the club may not practice any form of discrimination in granting membership or guest privileges based upon the race, color, creed, sex or national origin of any person. It is not conceivable that the legislature wished, in the absence of the "primary purpose" clause, to continue to provide the tax benefit to those who discriminate on the basis of race, color, creed and national origin. This Court finds that the legislative purpose was to eliminate discrimination by those within its reach through the tax statute and this goal was not conditioned on the continued protection or exception of one club, Burning Tree. The dominant purpose of Section 19(e)(4) only could be to eliminate public support for private discrimination through the taxing power. In light of the E.R.A., and the strong commitment of the legislature to eliminate discrimination based on gender, the dominant purpose of the statute may be carried out without the invalid "primary purpose" exception.

Considering the strong presumption in favor of severability and the dominant purpose of the statute, this Court finds that the invalid portion of Section 19(e)(4) of Article 81 is severable from the valid portions.

D.

LACHES

Defendant Burning Tree contends the plaintiffs' suit is barred by laches because the "circumstances forming the basis for plaintiffs' suit have existed unchanged, for nearly a decade." Burning Tree's Motion for Summary Judgment, p. 32. Accordingly, defendant Burning Tree alleges that its members would be prejudiced if plaintiffs' suit succeeds after a "delay" of ten years before challenging Section 19(e)(4). There is no claim by Burning Tree that their ability to defend the suit is in any way impaired or prejudiced because of the alleged delay. See, e.g. Randall v. Mayor and City Council of Baltimore, 512 F.Supp. 150 (D. Md. 1981).

The doctrine of laches is invoked only if it accomplishes the purpose of justice. Connelly v. Connelly, 190 Md. 79 (1948).

1984 SEP 13 AM 9:59
HOWARD COUNTY
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In this case, precluding a challenge to the constitutionality of a statute based on a claim of laches would not promote justice.

Furthermore, plaintiffs filed suit on August 12, 1983, within three years of the April, 1981 tax deferral agreement between Burning Tree and State Department of Assessments and Taxation. In determining whether laches will bar an action, courts often look to the statute of limitations as a guide. Cargill v. Brady, 321 Md. 455 (1963). Maryland's general statute of limitations is three years. Md. Cts. & Jud. Proc. Code Ann. §5-101. Plaintiffs filed within three years of the April, 1981 agreement which authorized Burning Tree's present tax deferral under Section 19(e)(4).

This Court finds that laches is not a bar to plaintiffs' suit.

E.

CONTRACT IMPAIRMENT

The defendant, Burning Tree, argues that the tax deferral it receives under Section 19(e), pursuant to a contract entered into with the State Department of Assessments and Taxation, is protected against impairment by the State by the Contract Clause, Article I, Section 10 of the United States Constitution. The Contract Clause states that

No State shall...pass
any...Law impairing
the obligation of
contracts.

Burning Tree, relying on the proposition that "Law" in the Contract Clause includes amendments to State Constitutions, such as E.R.A., argues that if E.R.A. were held to nullify the Burning Tree contract, this would be an impairment of (Burning Tree's) contract within the meaning of the Contract Clause.

The Contract Clause of the Federal Constitution is a limitation on the powers of the States to pass any law impairing the obligation of contracts. The general purpose of the Clause was to encourage trade and credit by promoting confidence in the stability of contractual obligations. United States Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977). The Contract Clause limits the

1984 SEP 13 AM 9:58

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power of the States to modify their own contracts as well as those between private parties. However, this limitation is not absolute and does not bar a proper exercise of the State's police power. The prohibition is directed at the legislative power of the State and not at the decisions of its courts. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); 16 Am.Jur.2nd, Judicial Decisions, Section 203,

The Supreme Court said in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 at 241:

First of all, it is to be accepted as commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this Court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public through contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Assuming that an impairment of Burning Tree's contract with the State were found to exist, the question arises whether that impairment is permissible.

An impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. United States Trust Co., supra at 25. A determination of necessity requires a finding that a less drastic modification or impairment is unavailable. Where the regulation substantially impairs the contract, the State must have a significant and legitimate public purpose behind the regulation, "such as the remedying of a broad and and general social or economic problem." Energy Reserves Group, Inc. v. Kansas Power & Light Co. 103 S.Ct. 697, 705 (1983).

1984 SEP 13 AM 9:59

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The E.R.A. was enacted to remedy a broad and general social problem. A less drastic modification would be inconsistent with the purpose of the Equal Rights Amendment. The result of complete impairment of the contract is reasonable and necessary and therefore constitutional under the Contract Clause.

II.

In Counts IV and V of the Bill of Complaint, the plaintiffs allege defendant Burning Tree's policy of excluding women from membership and guest privileges constitutes "state action" and that Burning Tree is therefore a "State actor." They allege the conduct of Burning Tree is a violation of Article 46 of the Maryland Declaration of Rights (E.R.A.). The plaintiff, Barbara Bainum Renschler, prays the Court issue a decree (1) enjoining Burning Tree from excluding her from membership because of her sex; and (2) directing Burning Tree to accept her application for membership and the application of any woman desiring membership in the Club.

The plaintiffs concede that the action inhibited by Article 46 is only such action as may fairly be said to be that of the State. See, e.g. Moose Lodge v. Irvis, 407 U.S. 163 (1972). Plaintiffs recognize, in their Motion for Summary Judgment, p. 20, "if Burning Tree is not a State actor, its membership policies are shielded from constitutional scrutiny. Under those circumstances, the State still may not provide tax subsidies to Burning Tree....But as long as Burning Tree received no affirmative State support for its policies, it would be free to discriminate, on any basis, at will."

The essence of plaintiffs' argument is that Burning Tree is a State actor because Burning Tree is intertwined with the State through Section 19(e)(4) of Article 81. However, the "primary purpose" provision of Article 81, Section 19(e)(4) is violative of Article 46 and is now null and void. See Part I of this Opinion. Thus, the State of Maryland plays no part in establishing, encouraging or sanctioning the membership or guest policies of Burning Tree. Under these circumstances, Burning Tree is not a

1984 SEP 13 AM 9:59

"State actor and therefore, the membership and guest policy of Burning Tree does not violate the Maryland Declaration of Rights.

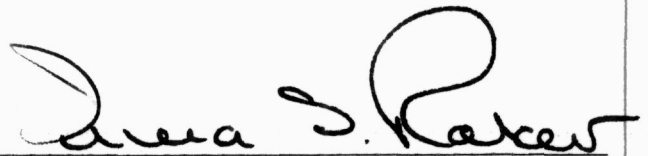
For the foregoing reasons, it is, this 13th day of September, 1984, in the Circuit Court for Montgomery County, Maryland,

ADJUDGED AND DECREED THAT that "primary purpose" provision of Article 81, Section 19(e)(4) of the Maryland Code violates Article 46 of the Maryland Declaration of Rights and is null and void, and it is further

ORDERED, that the State of Maryland and the Maryland State Department of Assessments and Taxation are hereby enjoined from granting to the defendant Burning Tree the tax preference in accordance with the exemption in Article 81 of the Maryland Code so long as it practices any form of discrimination in granting membership or guest privileges based on race, color, creed, sex or national origin, and it is further

ORDERED, on Counts IV and V judgment is hereby entered in favor of the defendants, and it is further

ORDERED, the costs of these proceedings are hereby apportioned equally between the plaintiffs and the defendants.



IRMA S. RAKER
Judge of the Circuit Court for
Montgomery County, Maryland

1984 SEP 13 AM 9:59
HOWARD W. SMITH
CLERK OF COURT
MONTGOMERY COUNTY, MD.

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