DA 18-0568

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 273

TOTEM BEVERAGES, INC., d/b/a The Do Bar,

Plaintiff, Appellee, and Cross-Appellant,

v.

GREAT FALLS-CASCADE COUNTY CITY-COUNTY BOARD OF HEALTH,

Defendant and Appellant, and Cross-Appellee.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADV 16-0112
Honorable Robert G. Olson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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Submitted on Briefs: July 17, 2019

Decided: November 19, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 The Great Falls/Cascade County City-County Board of Health (Board) appeals from the entry of summary judgment in favor of Totem Beverages, Inc. (Totem), challenging the District Court's determination that a Board regulation was invalid. Totem cross-appeals, challenging the District Court's denial of attorney fees and its determination not to reach Totem's selective enforcement claim. We reverse in part, and remand for further proceedings.

1. *Did the District Court err by granting summary judgment to Totem on the validity of the Regulation?*
2. *Did the District Court err by dismissing Totem's selective enforcement claim?*
3. *Did the District Court abuse its discretion by denying Totem's request for attorney fees?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 This case arises from actions that followed our decision in *MC, Inc. v. Cascade City-County Bd. of Health*, 2015 MT 52, 378 Mont. 267, 343 P.3d 1208.

¶3 In 1979, the Montana Legislature enacted the Montana Clean Indoor Air Act (MCIAA, or Act), §§ 50-40-101 to -120, MCA. The MCIAA prohibits smoking in an "enclosed public place," § 50-40-104(1), MCA, which is defined as "an indoor area, room, or vehicle that the general public is allowed to enter or that serves as a place of work . . . ." Section 50-40-103(3), MCA. In turn, "place of work" is defined as "an enclosed room where one or more individuals work." Section 50-40-103(7), MCA. Pursuant to § 50-40-110, MCA, the Department of Health and Human Services (Department) promulgated Admin. R. M. 37.113.101(2) (2019), which provides a definition of "enclosed

room" for purposes of the term "place of work" within § 50-40-103(7), MCA; *MC, Inc.*, ¶ 23. The Rule defines "enclosed room" as "an area with a wall on all sides reaching from floor to ceiling, exclusive of windows and doors, and does not include an area completely or partially open to the outside air such as a roofed shelter."

¶4 The MCIAA provides that "[t]he provisions of this part must be supervised and enforced by the department and the department's designees, [and] local boards of health . . . ." Section 50-40-108, MCA. The Board is a "city-county board of health" organized pursuant to § 50-2-106(1), MCA. Local boards of health may adopt regulations that do not conflict with regulations adopted by the Department "to implement the public health laws." Section 50-2-116(2)(c)(vi), MCA.

¶5 In June 2015, the Board adopted a regulation titled "Cascade City-County Board of Health Regulation Re: Montana Clean Indoor Air Act and Smoking Shelters" (Regulation). The Regulation was adopted in response to cited concerns expressed to the Department and the Board, and was intended to provide "additional clarity" regarding smoking shelters, a type of which had been declared to be "enclosed public spaces . . . subject to the MCIAA's prohibition on smoking" by this Court, in *MC, Inc.*, ¶ 30. The Regulation defined permissible smoking shelters, that is, not subject to the smoking prohibition, as either "unenclosed standalone shelter[s]" or "unenclosed shelter[s]" that met certain criteria, including a permanent opening that was no less than 20% of the entire square footage of the vertical plane forming the shelter's interior, and did not reduce airflow. Prior to adoption of the Regulation, the Board sent a letter to bar and tavern operators in Cascade

County, stating, "[t]he enclosed photos are existing structures here in Great Falls, that the [Board] has found to be in total compliance with the MT MCIAA, and as such there would be no need for any enforcement action by the [Board] on these structures." Some of the structures in the photos did not comply with the requirements of the subsequently adopted Regulation.

¶6 Totem is a Montana corporation and operates The Do Bar in Great Falls. It is undisputed that the MCIAA applies to The Do Bar. Section 50-40-103(3)(h), MCA; *see also MC, Inc*. The Do Bar includes two areas on its premises where smoking has been allowed in the past: the former smoking shelter attached to the Casino Room that was at issue in *MC, Inc.*, ¶ 19, now a non-smoking area; and a partially roofed outdoor "patio," which is the subject of the underlying litigation in this case.

¶7 Between November 2012 and March 2014, the Board conducted permitting and inspection activities at The Do Bar, including food establishment inspections on December 15, 2012, August 22, 2013, May 15, 2014, and May 20, 2014; and renovation inspections between spring 2013 and March 2014. During one inspection, a Board official photographed The Do Bar's patio area. However, the Regulation had not yet been adopted, and the Bar was not then cited for any violations of the MCIAA.

¶8 On January 26, 2016, Totem was served with a Notice and Order for Immediate Abatement (Notice) from the Board, citing alleged violations of the Regulation adopted in June 2015. The Notice was issued after the Board completed an inspection on The Do Bar's premises to determine Totem's compliance with the Regulation. The Notice stated

that smoking was taking place within "an enclosed public place" of the Bar, and ordered the Bar to "immediately cease and desist with all activities which allow, encourage and/or permit active smoking within The Do Bar." Totem initiated this action, seeking injunctive and declaratory relief. Totem also sought issuance of a preliminary injunction, which the District Court denied. Both parties filed motions for summary judgment. The District Court granted Totem's motion and denied the Board's, concluding the Regulation conflicted with the MCIAA and DPHHS rules in violation of § 50-2-116(2)(c)(vi), MCA, and was therefore void. The District Court declined to rule on Totem's selective enforcement claim, reasoning the issue was effectively mooted by its ruling that invalidated the Regulation. Totem sought attorney fees under §§ 27-8-313 and 25-10-711, MCA, but the District Court denied the request, reasoning the Board's arguments had facial merit.

¶9 The Board appeals the order granting summary judgment to Totem on the validity of the Regulation. Totem cross-appeals, challenging the District Court's determination to not reach its selective enforcement claim, and the denial of attorney fees. Additional facts will be discussed herein.

STANDARD OF REVIEW

¶10 Summary judgment is appropriate when no genuine issues of material fact exist, "and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, we view all evidence in the light most favorable to the non-moving party." *Borges v. Missoula Cty. Sheriff's Office*, 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976 (internal citations omitted). "We review a district court's

summary judgment order de novo, based on the same criteria applied by the district court. We determine whether the district court applied the law correctly." *MC, Inc.*, ¶ 10 (internal citation omitted). "Our review of constitutional questions is plenary." *Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 13, 393 Mont. 178, 430 P.3d 69.

¶11 "We review a district court's conclusion regarding the existence of legal authority to award attorney fees for correctness. If legal authority exists, we review a district court's order granting or denying attorney fees for an abuse of discretion. An abuse of discretion occurs when the district court acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Abbey/Land LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 62, 394 Mont. 135, 433 P.3d 1230 (internal citation omitted).

DISCUSSION

¶12 *1. Did the District Court err by granting summary judgment to Totem on the validity of the regulation?*

¶13 The Board argues summary judgment was inappropriate because promulgating the Regulation was a valid exercise of its authority under the MCIAA and DPHHS rules, and the Regulation neither contradicted the statute nor added requirements not envisioned by the Legislature. Totem answers that the District Court correctly determined the Regulation conflicted with the MCIAA and DPHHS rules, and was therefore invalid.

¶14 "We construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature. Statutory construction is a holistic endeavor and must account for the statute's text,

language, structure and object. We must also read and construe each statute as a whole so as to avoid an absurd result and to give effect to the purpose of the statute." *MC, Inc.*, ¶ 14 (internal quotations and citations omitted). To resolve an asserted conflict between a regulation and a statute, we consider whether the regulation "engraft[s] additional and contradictory requirements on the statute," or "engraft[s] additional, noncontradictory requirements on the statute which were not envisioned by the legislature." *Gold Creek Cellular of Montana LP v. State Dep't of Revenue*, 2013 MT 273, ¶ 12, 373 Mont. 71, 310 P.3d 533 (citing *Bell v. Dep't of Licensing*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979)). Regulations that are consistent with the statute "must also be reasonably necessary to effectuate the statute's purpose." *Gold Creek Cellular*, ¶ 12; § 2-4-305(6), MCA.[1]

¶15 The District Court determined that the Regulation conflicted with the MCIAA and DPHHS rules in four ways. First, the court concluded that the Regulation's requirement for a 20% permanent opening in the vertical plane conflicted with the Act, which does not apply to shelters that are "partially open to the outside air such as a roofed shelter." Admin. R. M. 37.113.101(2) (2019). The District Court reasoned:

[1] The District Court applied a conflict of law test from Ohio, *see Vill. of Struthers v. Sokol*, 140 N.E. 519, 521 (Oh. 1923), to determine whether the Regulation conflicted with the MCIAA and DPHHS rules, reasoning that "Montana law does not specifically state what happens when a regulation is adopted by a local board of health in conflict with rules of the Montana Department of Public Health and Human Services." Under that test, a conflict with state law exists if "the ordinance declares something to be right which the state law declares to be wrong, or vice versa" or if "one authority grants a permit or license to do an act which is forbidden or prohibited by the other." However, we have applied our precedent to conflicts between local regulations and laws passed by the Legislature, *Gold Creek Cellular*, ¶ 12; *Bell*, 182 Mont. at 23, 594 P.2d at 333, and believe it adequate to resolve the issues here. Accordingly, we decline to apply the foreign conflicts test utilized by the District Court.

> If a structure is partially open to the outside air, the MCIAA does not apply to that structure and a person can legally smoke within it. ARM § 37.113.101. If a structure has less than twenty percent (20%) of the entire square footage of the vertical plane forming the shelter's interior as a permanent opening that does not reduce airflow, a person cannot legally smoke in that structure under the Regulation. Thus, a partially open shelter, albeit with less than 20% openings in the vertical plane, is legal under the MCIAA but illegal under the Regulation.

Second, the District Court concluded the Regulation's requirement for a lockable door on a shelter was not required under the MCIAA or DPHHS rules. Third, under the Regulation, complaints regarding violations may be submitted to the Board anonymously, while DPHHS rules provide that a citizen may file a formal, signed complaint to initiate enforcement. Lastly, the MCIAA provides that, upon a third violation of the Act, a person who "owns, manages, operates, or otherwise controls" a public place subject to the Act is guilty of a misdemeanor, with increasing fines for subsequent violations. Section 50-40-115(2), MCA. A first violation is subject to a warning, and a second violation a written reprimand. The District Court reasoned that the abatement order pursued by the Board "skipped the whole MCIAA enforcement process." Based on these alleged conflicts between the Regulation and the MCIAA, the District Court declared the Regulation void in its entirety. We consider the District Court's conclusions in turn.

20% permanent opening requirement

¶16 The Regulation requires that at least 20% of the square footage of the vertical plane forming a shelter's interior must be a permanent opening that does not reduce airflow. Noting that an "enclosed room" where smoking is prohibited does *not* include "an area completely or partially open to the outside air such as a roofed shelter," Admin. R. M.

37.113.101 (2019), the District Court held the Regulation's 20% requirement unlawfully prohibited smoking in "a partially open shelter . . . with less than 20% openings in the vertical plane."

¶17 "Partially open" is not further defined by the administrative rules, but is a term used within the definitional exclusion for areas that are "completely or partially open to the outside air," for which a "roofed shelter" is provided as an example. A shelter that is only roofed would have vertical planes that are essentially 100%, or "completely," permanently open, and 0% closed. In comparison, a "partially open" roofed shelter would have vertical planes that are something less than 100% open, or something more than 0% closed. Under the Board's Regulation, roofed shelters with walls that are up to 80% closed, and only 20% open, are considered "partially open," not "enclosed," and permissible for smoking—a not ungenerous application of Admin. R. M. 37.113.101 (2019), given its example of a "roofed shelter" as being unenclosed. The District Court's conclusion that the Regulation unlawfully prohibits shelters that have "less than 20% openings" is inconsistent with our determination in *MC, Inc.* that the "less than 20% openings" at issue there did not "turn the [smoking room] into a partially open structure." *MC, Inc*., ¶ 25. While there were other facts about the smoking room in *MC, Inc.* that supported our conclusion it could not be considered "partially open," the size of the opening was one factor, and is the factor at issue here.

¶18 We agree with the Board that the 20% rule does not contradict the Act or the Department's rules, or adopt a noncontradictory requirement not envisioned by the

Legislature. *See Gold Creek Cellular*, ¶ 12; *Bell*, 182 Mont. at 23, 594 P.2d at 333. Important here is the Legislature's directive that "[t]he provisions of this part must be supervised and enforced by the department and the department's designees, local boards of health, and the boards' designees under the direction of the department," § 50-40-108, MCA, and the Legislature's grant of rulemaking authority. Section 50-40-110, MCA. The Legislature clearly intended that the Department and local boards would address the details necessary for the Act's application and enforcement. And, as evident from the outcome in *MC Inc.*, clarity about the meaning of "partially open" was necessary for the ongoing, uniform enforcement of the Act. While a different percentage may well have been permitted within the parameters of the Act and Admin. R. M. 37.113.101 (2019), the 20% requirement does not contradict the terms or intent of the Act. It is helpful to remember, at the end of the long line of definitional terms used in the Act, that the definition at issue here relates back to the definition of "place of work." Section 50-40-103(3), (7), MCA; *MC, Inc.*, ¶ 26. The Act is concerned with protecting the health and safety of employees who may be exposed to smoke in their areas of work. Section 50-40-102, MCA (the purpose of the Act is to protect "the public health and welfare by prohibiting smoking in public places and places of employment"). The 20% requirement furthers such protection, and was within the authority of the Board to adopt.

Lockable door requirement

¶19 Under the Regulation, any door constructed on a smoking shelter "shall be lockable so as to deter any vagrancy issues during non-operating hours." These "vagrancy issues,"

as discussed at Board meetings regarding adoption of the Regulation, include the problem of people drawn, in part, by the availability of discarded cigarette butts, and accessing the smoking shelters after hours. The MCIAA and DPHHS rules do not require smoking shelters to have locked doors, and, in fact, neither mention smoking shelters or doors at all, a point relied upon by the District Court in invalidating the Regulation.

¶20 The MCIAA prohibits "smoking in an enclosed public place[,]" § 50-40-104(1), MCA, for the purpose of protecting "the public health and welfare." Section 50-40-102, MCA. As discussed above, the Act then broadly delegates enforcement to "the department and the department's designees, local boards of health, and the boards' designees under the direction of the department[,]" § 50-40-108, MCA, enabling local boards of health, such as the Board, to adopt rules to implement the MCIAA. Given the Act's concern with the regulation of smoking and protection of the public health, we cannot conclude that the Regulation's lockable door requirement, which addresses the problem of non-patrons entering the shelters during closed hours and smoking discarded cigarette butts, is a regulation beyond the scope of the MCIAA or DPHHS rules, and beyond the Board's authority.

Complaint requirement

¶21 The District Court noted the Regulation "allows [the Board's] agents to proceed on anonymous complaints, or on no complaint at all," which the court concluded was irreconcilable with DPHHS rules providing that "[a]n individual who believes that a violation of the Montana Clean Indoor Air Act . . . has occurred may file a written or

electronic complaint with the department or the local health board or its designee that describes the violation, and provides the date of the violation and is signed by the complaining party." Admin. R. M. 37.113.112 (2019). Here, the Board initiated an abatement notice against Totem without receiving any citizen complaints.

¶22 However, we do not view the Regulation's complaint process as irreconcilable with or as grafting contradictory requirements upon the Act or DPHHS rules. Again, enforcement of the MCIAA is delegated to "the department and the department's designees, local boards of health, and the boards' designees under the direction of the department," which would necessarily include establishing guidelines for receiving reports of violations and conducting follow-up investigations. Section 50-40-108, MCA. As Totem acknowledges, an anonymous complaint does not require the Board to take action, but merely provides the option for the Board to initiate its own inspection or investigation, if it chooses to do so. The Board has the authority to conduct inspections pursuant to Admin. R. M. 37.113.108(1), (3) (2019), which together provide that "[t]he department, a local health board and their respective designees may conduct inspections of: (a) enclosed public places to determine if any violation of the Montana Clean Indoor Air Act . . . has occurred . . ." and that "[a]ny violation of the Montana Clean Indoor Air Act . . . must be reported to the local health board or its designee and the county attorney of the county in which the violation occurred." While citizen complaints are authorized, these provisions do not exclusively require a complaint to trigger an inspection or enforcement action under the MCIAA. As such, there is no conflict between the MCIAA, DPHHS rules, and the

Regulation regarding complaints. Indeed, DPHHS rules authorize the Board to act without any complaint at all.

Enforcement and penalties

¶23 Noting § 50-40-115, MCA, the misdemeanor criminal provision within the MCIAA, which provides for increasing fines after a warning and written reprimand, respectively, for a first and second violation of the Act, the District Court concluded the Regulation unlawfully permitted the Board to "skip[] the whole MCIAA enforcement process" by issuing an abatement order.

¶24 The Regulation provides that, "[a] person who fails to comply with the provisions of this regulation is subject to the penalty provisions of Mont. Code Ann. § 50-40-115. In addition, the Board may proceed to enforce this regulation under Mont. Code Ann. § 50-2-116(1)(i)." As noted above, § 50-2-116, MCA, sets forth the general duties and enforcement powers of local boards of health. It provides that local boards, "in collaboration with federal, state, and local partners," shall "bring and pursue actions and issue orders necessary to abate, restrain, or prosecute the violation of public health laws, rules, and local regulations." Section 50-2-116(1)(i), MCA. The MCIAA does not provide that the criminal penalties under § 50-40-115, MCA, are the exclusive remedy for violations of the Act, but, rather, additionally grants rulemaking authority and states that "the provisions of this part must be supervised and enforced by the department and the department's designees, local boards of health," which necessarily incorporates the general powers of the local boards. Section 50-40-108, MCA. Consequently, the Board may

discretionarily pursue either criminal penalties under § 50-40-115, MCA, or civil remedies under § 50-2-116(1)(i), MCA, or both. The Regulation is thus consistent with the MCIAA and DPHHS rules, and is reasonably necessary to effectuate the MCIAA's purposes.

¶25 Having determined that the Regulation does not conflict with the MCIAA or DPHHS rules, we conclude that the District Court erred by granting Totem's motion for summary judgment. The Board was entitled to summary judgment.

¶26 *2. Did the District Court err by dismissing Totem's selective enforcement claim?*

¶27 Totem argues the Board violated its constitutional rights by selectively enforcing the Regulation against Totem. Totem alleges that, as of January 26, 2016, no business other than those owned by Totem received a notice of abatement, despite other businesses operating smoking shelters in Cascade County that do not comply with the Regulation. Totem further alleges that in June 2016, the Board selectively "clarified" the Regulation, without amending it, to afford "special dispensation" to a business that supported the Regulation, and that these clarifications directly conflicted with the Regulation. Totem argues the Board sought to punish Totem because its principals were vocal opponents of the Regulation and were previously involved in litigation against the Board in *MC, Inc.*

¶28 A selective enforcement claim is a species of equal protection. Equal protection theories based on selective enforcement are different than, but similar to, "class of one" equal protection claims. Darian B. Taylor, Annotation, *Class-of-One Equal Protection Claims Based upon Law Enforcement Actions*, 86 A.L.R.6th 173, § 1. Indeed, Totem analyzes its selective enforcement claim under class of one equal protection authority,

relying primarily on *Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000), and we likewise analyze it as such. *See Losleben v. Oppedahl*, 2004 MT 5, ¶ 18, 319 Mont. 269, 83 P.3d 1271.

¶29 As explained by the U.S. Ninth Circuit Court of Appeals:

> The Equal Protection Clause ensures that all persons similarly situated should be treated alike. The equal protection guarantee protects not only groups, but individuals who would constitute a class of one. Where, as here, state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a class of one equal protection claim by demonstrating that it has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Where an equal protection claim is based on selective enforcement of valid laws, a plaintiff can show that the defendants' rational basis for selectively enforcing the law is a pretext for an impermissible motive.

Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004) (internal quotations and citations omitted); *see also Willowbrook*, 528 U.S. at 564, 120 S. Ct. at 1074-75 (holding plaintiff could assert and plead her equal protection claim as a class of one by alleging intentional but differential treatment of similarly situated individuals without a rational basis for difference in treatment, without alleging the Seventh Circuit Court's "alternative theory" of ill will); Taylor, 86 A.L.R.6th 173, § 2.

¶30 In *Willowbrook*, the U.S. Supreme Court allowed homeowners to bring an equal protection claim alleging their village government had discriminated against them when the village conditioned approval of a municipal water connection to homeowners' house on their acquiescence to a 33-foot-wide easement in favor of the village, despite the village requiring all other homeowners to grant only a 15-foot-wide easement to obtain the same

water service. *Willowbrook*, 528 U.S. at 563, 120 S. Ct. at 1074. The homeowners alleged that "the [v]illage's demand was actually motivated by ill will resulting from the [homeowners]'s previous filing of an unrelated, successful lawsuit against the [v]illage." *Willowbrook*, 528 U.S. at 563, 120 S. Ct. at 1074; *see Zimmer v. Vill. of Willowbrook*, 610 N.E.2d 709, 712 (Ill. App. 1993). The Court concluded the homeowners' allegations that the village had intentionally treated them differently from other, similarly situated homeowners, without any rational basis for the distinction, and that the easement demand was "irrational and wholly arbitrary," *Willowbrook*, 528 U.S. at 565, 120 S. Ct. at 1075, stated an appropriate claim for relief under equal protection analysis, and that the Seventh Circuit Court of Appeals had correctly refused to dismiss the claim. *Willowbrook*, 528 U.S. at 565, 120 S. Ct. at 1075.

¶31 Subsequently, after remand, the District Court for Northern Illinois ruled that the homeowners' class of one claim survived summary judgment because they had "identified evidence from which a reasonable jury could conclude that: (a) [the homeowners] were 'intentionally treated differently than others similarly situated[;]' and (b) the Village had 'no rational basis for the difference in treatment.'" *Olech v. Willowbrook*, No. 97 C 4935, 2002 N.D. Ill. LEXIS 19577, at *42 (Oct. 10, 2002) (quoting *Willowbrook*, 528 U.S. at 564, 120 S. Ct. at 1074). The homeowners offered evidence that twelve property owners who lived along public roadways received village water but were not required to grant a right-of-way or easement to receive that water. *Olech*, 2002 N.D. Ill. LEXIS 19577 at *42. The village did not dispute these facts but asserted it did not treat the homeowners

differently because it did not know about the other twelve property owners. *Olech*, 2002 N.D. Ill. LEXIS 19577 at *42-43. The district court determined the proffered evidence was sufficient to show "that there were others who were '*prima facie* identical in all relevant respects,' and who were not subjected to the requirements the [village] sought to impose on the [homeowners][,]" *Olech*, 2002 N.D. Ill. LEXIS 19577, at *43 (quoting *Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs*, 101 F.3d 1179, 1181-82 (7th Cir. 1996)), and that whether the defendant intended to treat the plaintiffs differently was "a disputed matter that must be resolved at trial." *Olech*, 2002 N.D. Ill. LEXIS 19577, at *43.

¶32 Here, as evidence in support of its class of one equal protection claim, Totem alleges through affidavits and Board documents that "at least seven other bars in Great Falls did not receive abatement notices despite noncompliance with the Regulation[,]" and that the Board admitted during discovery that enforcement of the Regulation had been selectively applied, but only due to the Board's lack of knowledge of other violators, similar to the defense by government entity in *Olech*, 2002 N.D. Ill. LEXIS 19577. Totem contends that the evidence establishes that the Board was informed "of at least 11 other establishments" that were noncompliant with the Regulation, as well as with other requirements of the MCIAA, but that the Board did not initiate enforcement actions against those establishments. Totem additionally alleges the Board elected not to enforce the Regulation's lockable door requirement against another bar owner who was supportive of the Regulation, and instead clarified the Regulation for that bar owner's benefit.

¶33 Based on the record, we conclude Totem has offered sufficient evidence to state a class of one claim under *Willowbrook*, 528 U.S. at 564, 120 S. Ct. at 1074, from which a jury could reasonably conclude that Totem was "intentionally treated differently" from other similarly situated bar and tavern owners, and that the Board had "no rational basis for the difference in treatment." *Willowbrook*, 528 U.S. at 564, 120 S. Ct. at 1074. Accordingly, Totem has presented disputed, material facts which "must be resolved at trial." *Olech*, 2002 N.D. Ill. LEXIS 19577, at *43.

¶34 *3. Did the District Court abuse its discretion by denying Totem's motion for attorney fees?*

¶35 Totem sought attorney fees under both § 25-10-711, MCA, and § 27-8-313, MCA. However, given our reversal of the District Court's invalidation of the Regulation, Totem is not a prevailing party on that claim and is not entitled to attorney fees. Any fees related to Totem's selective prosecution claim will be addressed in that litigation upon remand.

CONCLUSION

¶36 In conclusion, we reverse the District Court's entry of summary judgment in favor of Totem on the Regulation. On that issue, the District Court will enter summary judgment in favor of the Board. We remand this matter for further proceedings on Totem's selective prosecution claim, in accordance with our decision herein.

¶37 Reversed and remanded for further proceedings.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA