Coates' Canons Blog: NC Court of Appeals Upholds Application of State Smoking Ban to For-Profit Private Clubs

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Today, the Court of Appeals issued an opinion in ***Liebes v. Guilford County Department of Public Health***, one of two cases challenging provisions of the 2009 law that banned smoking in restaurants and bars. The law exempts non-profit private clubs from the smoking ban, but does not provide an exemption for private clubs that are for-profit. The plaintiff, owner of a for-profit private billiards club, argued that this distinction violated the equal protection clauses of the North Carolina and federal constitutions. The Court of Appeals rejected the challenge, holding that there is a rational basis for the legislature's decision to treat for-profit and non-profit clubs differently.

Since January 2, 2010, there has been a statewide ban on smoking in the enclosed areas of most restaurants and bars, and some lodging establishments as well (**G.S. 130A-496**). A restaurant is subject to the ban if it is a food service establishment that is required to be inspected, graded, and permitted under state public health laws. A bar falls under the ban if it has a permit to sell alcoholic beverages under certain sections of the state's ABC laws. However, there is an exception to the ban for a bar or restaurant that is a private club, defined as

> [a] country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member's guest, and is either incorporated as a nonprofit corporation in accordance with [G.S. Chapter 55A] or is exempt from federal income tax under the Internal Revenue Code … .

Gate City Billiards Country Club is an establishment owned by Don Liebes. According to its **website**, it has over a dozen billiards tables and hosts regular billiards tournaments. It also serves alcoholic beverages and has one of the ABC permits referenced in the smoking law's definition of "bar." However, it is neither incorporated as a nonprofit under state laws nor exempt from federal income tax—criteria that must be met to be considered a private club for an exemption from the smoking law.

After the smoking ban went into effect in January 2010, Gate City continued to permit smoking in its enclosed areas. The Guilford county health department subsequently sent two letters notifying Mr. Liebes that his establishment was in violation of the state smoking law. On March 3, 2010, the health department sent a third notice of violation letter and imposed a $200 administrative penalty. A fourth notice of violation and a second $200 administrative penalty followed on March 11, 2010.

Gate City appealed the imposition of the administrative penalties to the county board of health (which is the first route of appeal for these matters under G.S. 130A-24). The board of health upheld the penalties, and Gate City appealed to the district court, arguing that the distinction the law makes between non-profit private clubs and for-profit businesses that qualify as private clubs under the ABC laws is not rationally related to a legitimate state interest and therefore violates equal protection. The district court upheld the board of health's actions, and Mr. Liebes took his case to the North Carolina Court of Appeals, which issued its decision today.

The opinion reviews the tiers of scrutiny that are used in analyzing equal protection challenges and concludes that the rational basis test applies to this case, as no suspect class of persons is involved and smoking is not a fundamental right. Under the rational basis test, the question is whether a distinction made by a law bears a rational relationship to a legitimate governmental interest. The court cited a number of cases describing and applying the rational basis test, emphasizing that governmental classifications are presumptively valid and that rational basis review is highly deferential,

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requiring only that a court be able to “envision some rational basis for the classification” (citation omitted).

Gate City did not contend that it would have been unconstitutional for the legislature to exempt all private clubs from a smoking ban law (indeed, the plaintiff would appear to favor such an exemption). Rather, its position was that the distinction the law makes between non-profit and for-profit private clubs—exempting the former but not the latter—lacks a rational basis. Gate City made two main arguments.

First, it pointed out that it is a “private club” under the ABC law’s definition of that term. To qualify as a private club under the ABC laws, an establishment must be open only to members and guests, but need not be nonprofit. Gate City contended that a comparison of the ABC law’s definition and the smoking law’s definition make apparent that the latter’s is irrational:

> It would appear, therefore, that the General Assembly actually went out of its way to penalize and discriminate against for-profit private clubs by specifically exempting only nonprofit clubs from its reach, even though the ABC statute, which was already on the books, did no such thing.

The court rejected this argument, pointing out another relevant definition that was already on the books, in state public health laws regulating the sanitation of food and beverage facilities. The state’s public health code has long contained a definition for “private club” that is almost identical to that in the smoking law, and it also allows an exemption from sanitation requirements only for a private club that is non-profit. The court drew two points from this: (1) that in enacting the smoking law, the General Assembly had at least two existing statutory definitions to choose from and it chose this one; (2) that the choice of the public health code’s definition was rational since both sanitation and smoking are matters of public health concern, while the ABC laws are “grounded in concerns over retail activity and commerce.” It further concluded that, even without a nearly-identical definition in the sanitation laws, the General Assembly’s decision to exempt only non-profit private clubs from the smoking ban would be a rational means of protecting the health of individuals in public places, while preserving the freedom of organizations that are “genuinely closed to the public” (such as fraternal organizations) to decide whether to allow smoking.

Gate City’s second argument noted that the stated policy of the smoking ban is to protect the health of individuals in public places and in places of employment (**G.S. 130A-491**). It pointed out that the non-profit private clubs exempted from the ban are also places of employment, then asked:

> [W]hat is the rational basis for treating employees of private nonprofit … clubs and fraternal organizations differently from employees of private, for-profit billiards clubs … given the intent of the General Assembly in protecting the health of individuals in places of employment[?]

The court rejected this as a flawed argument that contradicted Gate City’s earlier position that a general private club exemption would pass the rational basis test, as a focus on employee protection would necessarily call into question the rationality of an exemption for private clubs generally. (Gate City had specifically emphasized that the issue in this case was the narrower one of whether the distinction between for-profit and non-profit clubs is rational.)

The court also pointed out that the smoking ban law has another stated purpose: to prohibit smoking in public places. It reasoned that the decision to exempt only non-profit private clubs from the ban was rationally related to this legislative goal, even if it fails to further other goals of the same law.

Finally, the court speculated that the General Assembly may also have considered that experience with the ABC law’s definition suggests that it is problematic. It described several administrative cases in which establishments with the ABC “private club” designation may in fact have been open to the public. It also noted that in 2009 the legislature directed the ABC commission to examine and report to a legislative committee on violations and noncompliance by private clubs. The court opined that it is plausible that, “[r]ather than rely on a definition that has proven to be subject to avoidance, the legislature reasonably imposed a more narrowly tailored definition of private clubs to effectuate the purpose of the exemption.” This, too, would provide a rational basis for the distinction made by the legislature.

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Having determined that the legislature had a rational basis for distinguishing between for-profit and non-profit private clubs, the court concluded that the law did not violate the state or federal equal protection clauses, either on its face or as applied to Gate City.

There is a lot to digest in today's opinion, and this post provides only a summary. I welcome your thoughts and further discussion in the comments section.

Links

- appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05NzktMS5wZGY=
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-496
- www.gatecitybilliardsclub.com/
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-491

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