Coates' Canons Blog: Smoking Law Update: N.C. Court of Appeals Clarifies the Private Club Exemption

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Article: https://canons.sog.unc.edu/smoking-law-update-n-c-court-of-appeals-clarifies-the-private-club-exception/

This entry was posted on February 20, 2013 and is filed under Public Health, Smoking Laws

Smoking has been prohibited in most North Carolina restaurants and bars for three years now, since January 2010. The legislation that imposed the smoking ban (**S.L. 2009-27**) included an exemption for non-profit private clubs—an exemption that began provoking questions before the law even went into effect. In recent months, the North Carolina Court of Appeals has answered two key questions:

- Does the law's distinction between nonprofit and for-profit private clubs deny equal protection of the law to the owners of for-profit private clubs?
- Must a country club be nonprofit to qualify for the private club exemption?

The Court of Appeals' answers to these questions are no and yes, respectively. In ***Liebes v. Guilford County Department of Public Health***,[1] the Court of Appeals held that there is a rational basis for the legislature's decision to treat for-profit and nonprofit private clubs differently, and that the distinction therefore does not violate a for-profit club owner's right to equal protection. In ***Edwards v. Morrow***,[2] the court concluded that the law requires country clubs as well as other types of private clubs to be nonprofit in order to qualify for the exemption. The North Carolina Supreme Court denied review in both cases.

The Equal Protection Question

The statewide smoking ban applies to restaurants that must be inspected and permitted under the state's public health laws, and also to bars that have certain ABC permits. (See the definitions of "restaurant" and "bar" in **G.S. 130A-492**.) Gate City Billiards Country Club in Guilford County is a members-only establishment that serves alcoholic beverages and has a type of ABC permit that brings it within the law's definition of a "bar" that is subject to the ban. The establishment also is considered a "private club" under North Carolina's ABC laws, but not under the smoking ban, which defines "private club" 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 Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105?130.2(1). For the purposes of this Article, private club includes country club.

G.S. 130A-492(11).

Because Gate City is *not* a nonprofit establishment, the Guilford County Department of Public Health (Guilford DPH) concluded that it was subject to the smoking ban, which took effect on January 2, 2010. The bar's owner, Don Liebes, continued to allow smoking in his establishment after that date. In accordance with procedures in **G.S. 130A-22(h1)**, Guilford DPH notified Liebes that he was in violation of the law and gave him an opportunity to comply, then imposed administrative penalties of $200 per day when he failed to do so. A person aggrieved by a local health department's imposition of administrative penalties must first appeal to the local board of health, but if dissatisfied with the board's decision may contest it in district court (**G.S. 130A-24**). In this case, the penalties were upheld by both the Guilford board of health and the district court. Liebes then appealed to the NC Court of Appeals.

In his appeal, Liebes argued that the smoking law's distinction between nonprofit and for-profit private clubs violated his constitutional right to equal protection. He argued that the smoking law's definition of "private club" was patently irrational because it was inconsistent with the ABC law's definition of the same term. The Court of Appeals rejected this argument,

pointing out that the smoking law's definition closely matches another definition of "private club" in the food and lodging sanitation laws, and that those laws—like the smoking ban—are concerned with the protection of the public health. Liebes next noted that the stated policy of the smoking ban is to protect the health of individuals in public places and places of employment, and contended that because the nonprofit clubs exempted from the ban are also places of employment, the distinction between for-profit and nonprofit clubs is not rational. The court rejected this argument as well, pointing out that the smoking law has another stated purpose: to prohibit smoking in public places. It reasoned that the decision to exempt only nonprofit private clubs from the ban was rationally related to this legislative goal, even if it fails to further other goals of the same law.

The Country Club Question

As regular readers of this blog know, I have wondered for some time about the scope of the smoking law's exemption for country clubs. Shortly after the law became effective, I wrote **this post**, in which I tackled two questions: What type of entity counts as a "country club"—a term the law does not define? And must a country club meet the four conditions for "private club" that are in the statute's definition of that term in order to qualify for the exemption?

The definition clearly required that most private clubs meet four conditions to be eligible for the ban: (1) maintain selective membership, (2) be operated by the members, (3) provide no food or lodging for pay to anyone but members and guests, and (4) be nonprofit. However, I believed the law was ambiguous as to country clubs, and that there was a reasonable argument that a country club did not have to meet those conditions. (Not everyone agreed with me, as a comment to my post reveals. Also, the North Carolina Division of Public Health has consistently maintained that the four conditions applied to country clubs.)

The Court of Appeals has spoken, and we now know that a country club must be nonprofit to qualify for the exemption.

In *Edwards v. Morrow*, the owners of several private bars in Pitt County allowed smoking to continue in their establishments after the effective date of the smoking ban, and were ultimately subject to administrative penalties imposed by the local health director. After the local board of health upheld the penalties, the bar owners appealed to the district court, arguing that the law violated equal protection by exempting all country clubs from the ban but not providing an exemption for similarly situated private clubs that are not country clubs. In this case, the district court agreed with the bar owners, holding that the law was unconstitutional as applied to them and unenforceable against them. The Pitt county health director appealed.

The Court of Appeals first rejected the bar owners' contention that the law exempts *all* country clubs from the smoking ban. The court noted that the term "country club" is not defined in the General Statutes and its meaning is ambiguous. The court considered but did not answer the question of what characteristics an organization must have to be considered a "country club" (must there be a golf course? must it be suburban? etc.). Instead it concluded that it need only interpret the term in a way that gives effect to the legislature's intent, which the court said is to protect individuals in public places from secondhand smoke while also respecting the rights of association of members of truly private organizations. Thus the court concluded that the law must exempt only private country clubs, not public country clubs. While there is no clear test for distinguishing private country clubs from public country clubs, nonprofit status presumptively ensures that a country club is truly private, as for-profit country clubs are actually quasi-public in that they seek to maximize profit with membership open to anyone willing to pay the fee.

Once the court determined that the exemption applies only to nonprofit country clubs, the Pitt county bar owners' argument dissolved. It was based on the statute's distinction between for-profit country clubs and other for-profit private clubs—but according to the court, no such distinction exists. The court concluded by reiterating *Liebes'* holding that there is a rational basis for distinguishing between nonprofit and for-profit clubs. Judge Beasley concurred in the majority's holding but disagreed with the conclusion that the legislature intended the exemption for country clubs to be limited to nonprofit country clubs. In December, the Supreme Court dismissed the owners' appeal and denied discretionary review.

Conclusion

The North Carolina law that bans smoking in most restaurants and bars contains an exemption for "private clubs." In order to qualify for this exemption, a club must meet four criteria. One of those criteria requires the club to be a nonprofit. Specifically, it must be incorporated as a nonprofit under state laws, or it must be exempt from federal taxes because it

qualifies as a tax-exempt nonprofit under the Internal Revenue Code. The requirement that a club be a nonprofit to qualify for the exemption extends to country clubs as well as other private entities, such as bars that are considered private under the state's ABC laws. The legislature's distinction between for-profit and nonprofit private clubs has a rational basis and therefore does not run afoul of state and federal constitutional guarantees of equal protection.

Now we know.

[1] 713 S.E.2d 546 (N.C. App. July 19, 2011), *review denied*, 365 N.C. 361, 718 S.E.2d 396 (2011).

[2] 725 S.E.2d 366 (N.C. App. Mar. 20, 2012), *appeal dismissed and review denied*, 2012 WL 6651164 (N.C. Dec. 12, 2012).

Links

- www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2009-2010/SL2009-27.pdf
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