What Defines a Private Club?

In order to qualify for the "private club" exemption to the North Carolina Smoke-Free Restaurants and Bars Law (G.S. 130a-491, et seq.), a club must satisfy all of the following criteria:

(1) Membership: The club must maintain **selective members**.
(2) Operations: The club must be **operated by the members**.
(3) Restricted service: The club must not provide food or lodging for pay to anyone who is not a member or a member's guest.
(4) Non-profit status: The club must either be incorporated as a non-profit corporation under state law (G.S. Chapter 55A); or exempt from paying federal income tax under federal Internal Revenue Code as defined in G.S. 105-130.2(1).

In ***Liebes v. Guilford County Department of Public Health*,** 213 N.C. App. 426, 724 S.E. 2d 70, a case interpreting North Carolina's smoke-free restaurants and bars act, the North Carolina Court of Appeals relies on established case law that (1) provides rationale for exempting private clubs and (2) defines when a club can be called "private." Case law relied on by the *Liebes* court and additional relevant case law is discussed below.

Rationale for Exempting Private Clubs

"Private clubs are, by their very nature, not open to the public, and do not present the same threat to public health. Limiting the exception to private clubs is a reasonable means of keeping the number of places that qualify for the exception small, thereby protecting a greater percentage of the dining public; it also prevents restaurants that are open to the public from avoiding the reach of the ordinance by charging a nominal membership fee and declaring themselves to be private clubs." *City of Wausau v. Jusufi*, 763 N.W.2d 201, at 203-04. "The ordinance's method of distinguishing private clubs from other restaurants seeks to protect the greatest number of restaurant patrons, while preserving the right to associate in truly private clubs that are not open to the public." Id. at 205.

How do you determine if a club is truly "private?"

It is necessary to consult case law to resolve the question of what is a private club. The cases reveal that there is no single definition of "private club." Courts consider a multitude of factors, no one of which is dispositive. Each factor is considered and either tips the balance for or against private club status. As the Court said *in Nesmith v. Y.M.C.A.*, 397 F.2d 96 (1968), "In determining whether an establishment is in fact a private club, there is no single test. A number of variables must be examined in the light of the Act's clear purpose of protecting only the genuine privacy of private clubs whose membership is genuinely selective." Id. at 101-102.

When determining whether a club is truly private or if an entity is merely cloaking itself as a membership organization as a subterfuge to avoid a certain law, courts rely on the eight factors distilled in *United States of America v. Lansdowne Swim Club*, 713 F. Supp. 785 (1989):

1) the genuine selectivity of the group in the admission of its members;
2) the membership's control over the operations of the establishment;
3) the history of the organization;
4) the use of the facility by nonmembers;
5) the purpose of the club's existence;
6) whether the club advertises for members;

7) whether the club is for profit or nonprofit; and
8) the formalities observed by the club, such as bylaws, meeting, membership cards, etc.

The First, Most Important Factor: Genuine Selectivity

The Courts have agreed that the genuine selectivity of the membership process is the most important factor in ascertaining private club status. Courts construing this provision, including the Supreme Court, have concluded that genuine selectivity is an integral characteristic of a private club. *See, e.g., Tillman v. Wheaton-Haven Recreation Assn., Inc.,* 410 U.S. 431 (1973) at 438, 93 S. Ct. at 1094; *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 at 236, 90 S. Ct. at 404; *Wright v. Salisbury Club, Ltd.,* 632 F.2d 309 at 312; *Durham v. Red Lake Fishing & Hunting Club,* 666 F. Supp. 954, 960 (W.D.Tex.1987); *People of the State of New York v. Ocean Club,* 602 F. Supp. 489, 495 (E.D.N.Y.1984); *Brown v. Loudoun Golf Country Club, Inc.,* 573 F. Supp. 399 at 403; *United States v. Trustees of Fraternal Order of Eagles,* 472 F. Supp. 1174, 1175-76 (E.D.Wis.1979); *Cornelius v. Benevolent Protective Order of Elks,* 382 F. Supp. 1182, 1203 (D.Conn. 1974) (three-judge panel); *Wright v. Cork Club*, 315 F. Supp. 1143 at 1151 (S.D. Tex. 1970); *United States v. Jordan,* 302 F. Supp. 370, 375 (E.D.La. 1969).

A number of features reflect a club's genuine selectivity in membership practices: **the substantiality of the membership fee**, *see Brown,* 573 F. Supp. at 403; **the numerical limit on club membership** (apart from the capacity of the facilities), *see Jordan,* 302 F. Supp. at 375; **the membership's control over the selection of new members**, *see Daniel v. Paul,* 395 U.S. 298 at 301 (1969), 89 S. Ct. at 1699 and *Jordan,* 302 F. Supp. at 375; **the formality of the club's admission procedures**, *see Brown,* 573 F. Supp. at 403; **the standards or criteria for admission**, *see Nesmith,* 397 F.2d at 102 and *Cork Club,* 315 F. Supp. at 1151; **and whether and how many applicants have been denied membership** relative to the total number of applicants, *see Tillman,* 410 U.S. at 438 & n. 9, 93 S. Ct. at 1094 & n. 9; *Salisbury Club,* 632 F.2d at 312; *Durham v. Red Lake Fishing Hunting Club,* 666 F. Supp. 954 at 960 (1987); *Ocean Club,* 602 F. Supp. at 495; *Brown,* 573 F. Supp. at 403; *United States v. Trustees of Fraternal Order of Eagles,* 472 F. Supp. 1174 at 1176 (E.D. Wisc. 1979); *Jordan,* 302 F. Supp. at 375.

The Lansdowne Court looked at a variety of facts to determine whether the club was genuinely selective:

- Were membership applicants investigated in any meaningful way?
- Were there articulated standards or criteria for approving applications?
- Did the club provide voting members with any information about applicant interviews?
- Are recommendations required? If so, are their contents shared with the voting members?
- How many applications were rejected?
- How substantial were the membership fees?
- Is there a limit on the number of members?
- Is there a formal admission procedure?
- Are there any objective criteria or standards for admission?
- Does the club provide any information to voting members as to whether the applicant would be compatible with the existing members?

- Did the club establish any eligibility standards, i.e., economic, social, geographical, professional?

What *does* selective membership look like?

"Where there is a ... policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective." *Nesmith,* 397 F.2d at 102. "If there is no established criteria for selecting members, the courts are reluctant to accept the claim of private status." *Cork Club,* 315 F. Supp. at 1151.

The few establishments that Courts have found to possess a selective process are readily distinguishable. In *Cornelius v. Benevolent Protective Order,* 382 F. Supp. 1182 at 1203 (1974), three judges of the District of Connecticut found that a local Elks club was selective because it had clear admission standards: "only white male citizens of the United States who believe in God and who live within the jurisdictional limits of the local lodge were eligible for membership." In addition, the club had extensive procedures for investigating the suitability of an applicant: background questions were answered, sponsorship by a member was required, the applicant appeared before an investigating committee who issued a report to the general membership, and the membership was voted on the applicants.

The *Cornelius* Court relied on the Supreme Court's decision in *Tillman* as support for its consideration of the selectivity factor. *Tillman* recognized the importance of selectivity in substance and form. The Court in *Cornelius,* 382 F. Supp. at 1203, also cited *Jordan,* 302 F. Supp. at 375-76, which found that the number of applicants rejected was relevant to determining the selectiveness of a club.

In *Kiwanis Int'l v. Ridgewood Kiwanis Club,* 806 F.2d 468 (3d Cir.1986), *cert. dismissed,* 483 U.S. 1050, 108 S. Ct. 362, 97 L. Ed. 2d 812 (1987), the Court emphasized the importance of selective membership practices and highlighted a number of facts which differentiate the Kiwanis Club from Lansdowne: the Kiwanis Club had only twenty-eight members, with ten individuals having been members for over twenty years; only twenty members had been admitted in the last ten years; the club imposed local membership requirements and limited solicitation was conducted. *Id.* at 475-76. The Court concluded that "[t]his evidence of membership practices and policy does not reflect an open and unrestricted invitation to the community at large to join [the club]." *Id.* at 476.

Use of Facility by Nonmembers

Courts have analyzed the extent to which a club is trying to attract revenue from non-members. "If the facilities … are regularly used by nonmembers, who are not bona fide guests of members, then the facilities cannot be said to be private. `A genuine private club limits the use of club facilities or services to members and bona fide guests.' *Note,* 30 Mont.L.Rev., 47, 52 (1968). See *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967)*; Castle Hill Beach Club v. Arbury*, 2 N.Y.2d 596 (N.Y. 1957)*; Gillespie v. Lake Shore Golf Club.* "It defeats the very purpose of a private club to allow the indiscriminate use of club facilities by nonmembers on a regular basis." *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970).

If facilities are regularly used by nonmembers, this contradicts its purported desire to be exclusive. The more that clubs morph into places of public accommodation in order to attract additional sources of revenue from non-members, the more vulnerable they become to losing their private membership status and the legal protections it carries.

Advertising for Members

In *Lobel v. Woodland Golf Club of Auburndale*, 260 F. Supp. 3d 127 (2017), the Court concluded: "Establishments that 'advertise and solicit new members do not fall within the [ADA's] private club

exemption." *Martin*, 984 F.Supp. at 1325 (D. Or. 1998), aff'd, 204 F.3d 994, (9th Cir. 2000), aff'd, 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001). In particular, any advertising that is 'designed to increase patronage of the clubs' facilities' cuts against private-club status. *Wright v. Cork Club*, 315 F.Supp. 1143, 1152 (S.D. Tex. 1970). In *Recreational Dev. of Phoenix v. City of Phoenix*, 83 F. Supp. 2d 1072 (D. Ariz. 1999), the Court stated: "The degree of selectivity of membership by the clubs falls far short of the selectivity of membership in *Kiwanis Int'l.* The clubs advertise in newspapers and operate websites promoting their establishments." Therefore, when considering this factor, courts examine "whether and, if so, to what extent and in what manner [an establishment] publicly advertises to solicit members or to promote the use of its facilities or services by the general public." *Bommarito v. Grosse Point Yacht Club*, 2007 WL 925791, at 4.

Additional Cases Citing Lansdowne's Eight-Factor Framework

Ring v. Boca Ciega Yacht Club, 4 F.4th 1149 (11th Cir. 2021)
The Court saw subterfuge in a club's private status where "[t]he Club's membership criteria are lax, and it appears from the record that any member of the public who is interested in boating and able to pass a criminal background check is almost guaranteed acceptance."

Daniel v. Paul, 395 U.S. 298, 301-02, 23 L. Ed. 318, 323 (1969)
"A business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs" was not a private club and that the "'membership' device" of a twenty-five cent seasonal fee and membership card was "no more than a subterfuge designed to avoid coverage of the 1964 Act."

Brounstein v. American Cat Fanciers Assoc., 839 F. Supp. 1100 (D.N.J. 1993)
The Court concluded that a membership organization that is "open to any person eighteen years of age or older, who is interested in cats . . . upon making application for membership . . ." was not a private membership organization.

Taverns for Tots, Inc. v. City of Toledo, 307 F. Supp. 2d 933, 944 (2004)
The organization would not qualify as a private club under Lansdowne's factors and thus "does not meet any conventional definition of a 'private' club or association," nor was it a "bona fide not-for-profit corporation," precluding it from seeking an exemption under a municipal anti-smoking ordinance.

"At its heart, the City's contention is that Taverns for Tots is a sham designed and implemented to circumvent the City's otherwise lawful enforcement of its ordinance barring smoking in places of eating establishments and bars." Further, "[t]he City contends that irreparable harm will be caused to the health and welfare of other patrons at places of eating establishments and bars if enforcement of its ordinance is frustrated by the plaintiff. This is an important consideration, even though the City granted extensions to such establishments to comply with the ordinance by constructing separate enclosed smoking areas."

"Failure to bar the plaintiff's activities in eating establishments and bars until it has sought and qualified for an exemption would harm the non-smoking population of Toledo, which would continue to be subject to the harmful effects of environmental tobacco smoke. In addition, the enforcement mechanism set in place by the ordinance would be frustrated. This has become of greater significance in view of the apparent sham nature of the plaintiff organization." The Court found that the public interest clearly favored granting the restraining order.

People v. A Bus. or Buss. Located at 2896 W. 64th Ave., 989 P.2d 235, 238-39 (Colo. Ct. App. 1999)

A nude spa house was not a private club where the only membership qualification was being a 21-year-old male willing to initial an application and pay membership fee; existing club members had no control over operation; formalities were not observed; and club was operated for a profit, such that "[t]he sole purpose of the purported conversion to a private club format appear[ed] to be for the avoidance of the county ordinances."

Hendricks v. Commonwealth, 865 S.W.2d 332, 335 (Ky. 1993)

Lansdowne factors indicated "the Society was established for the sole purpose of avoiding the requirements of a newly enacted city ordinance regarding nudity in a public place."