

VALIDITY OF NONRESIDENT AND OTHER DISCRIMINATORY REGULATIONS
IN MUNICIPAL RECREATION

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In times of constrained budgets, high inflation, and eroding tax bases, parks and recreation systems are relying more heavily on user fees and perhaps limiting facility use to residents to make up for the shortfall in public revenues. It is, therefore, appropriate that administrators be aware of some general legal principles which determine the validity of discriminatory fee structures and the exclusion of nonresidents by local recreation agencies.

The law of "municipal corporations" provides a starting point to local public institutions which derive their limited authority from the sovereign power of the state. Such local governmental authority is usually expressed in a corporate charter. This charter enumerates the specific powers of government that have been conferred on cities, villages, towns, and other public entities by the state.

In addition to expressed powers contained in the corporate charter, municipal corporations derive implied police power from the sovereignty of the state. Police power allows a municipal corporation limited authority to take those actions deemed necessary to preserve the public health, safety, and welfare.

SCOPE OF POWER

Absent a clear delegation of power from the state, municipal corporations may not ordinarily have the authority to charge revenue producing user fees as a reasonable exercise of police power. Actions taken by municipal corporations which are outside their defined scope of power are "ultra vires" and consequently void.

Grants of power to charge fees are strictly construed against the exercise of this power, especially where the purpose of the fee is to raise revenue (9 McQuillan, *Municipal Corporations*, 3rd edition revised 1978, 26.24, p. 51). As a result, the authority to provide a given recreational opportunity does not necessarily imply the authority to charge participants a fee.

While the exercise of authority is valid, the charging of the fee may be ultra vires. This general principle, however, does not necessarily hold in every jurisdiction.

According to McQuillan, the power of a municipality to impose a fee to cover the cost of a police power regulation or to raise revenue for general municipal purposes "depends upon the legislative policy of the particular state, the terms of the grant of power [from the state to the municipality], and the construction placed thereon by the courts" (9 McQuillan § 26.24 p. 58).

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As a result, park and recreation professionals must be aware of relevant statutes and court decisions in their particular jurisdiction to determine the limits of municipal recreation fee authority.

In the case of *Kirsch Holding Co. v. Borough of Manasquan*, 24 N.J. Super 91, 93 A2d 582, (1952) a local ordinance designed to regulate beach use through registration fees for all users over 12 years old was declared void as an ultra vires act. Quoting McQuillan, the court said that “municipal power to regulate a particular activity embraces or implies the power to license as a mode of regulation and to impose a license fee sufficient in amount to cover the cost of regulation.” This power to regulate, however, did not authorize the imposition of a fee to produce additional revenue.

In this instance, the court found that the user fee was not a mode of regulation. It had no demonstrable relationship to crowd control or the preservation of public safety on the beach. As a result, the ordinance was not a proper exercise of municipal police power.

According to the court, a municipal corporation “possesses only such rights and powers as have been granted in express terms, or arise by necessary or fair implication, or are incident to the powers expressly conferred or are essential to the declared objects and purposes of the municipality.” At the time, there was no express grant of power to municipalities by the State of New Jersey to raise revenues through beach fees.

The court refused to find implied police power absent a clear showing by the municipality of the fee’s relationship to the public health, safety, and welfare.

In the case of *Logan v. Town of Somerset* 271 Md 42, 314 A2d 436 (1974), the court found that the town’s charter limited the provision of recreational facilities to residents of the town. A nonresident of the town had challenged a resolution which restricted the use of a municipal swim club in a public park to dues paying residents.

The town charter empowered the town to adopt all ordinances and resolutions “not contrary to the Constitution and the laws of the State of Maryland . . . as it may deem necessary for the protection and promotion of the health, safety, comfort, convenience, welfare and happiness of *the residents of the town* (emphasis added) and visitors thereto and sojourners therein.” Ignoring the possibility that plaintiff Logan may have qualified as a “visitor” or “sojourner” under the town charter, the court found the town without the power to provide a swimming pool for the nonresidents use. “The Town is a governmental agency operating under an established Charter . . . the Town would be without power to operate a recreational facility for persons other than residents of the Town ...[Thus] the restriction of the use of the swimming pool to dues paying members resident in the Town of Somerset is lawful...” According to the court’s interpretation, the town had no authority to admit nonresidents to the swim club.

EQUAL PROTECTION CHALLENGES

Although the Somerset town charter as interpreted by the court in the “Logan” case required the total exclusion of nonresidents, this practice appears to raise certain constitutional questions. Specifically, the equal protection clause of the U.S. Constitution prohibits a state or other governmental unit from denying “any person within its jurisdiction equal protection of the law.” At first glance, a municipal regulation which discriminates against nonresidents seems to lack the sense of equality implicit in the phrase “equal protection of the law.” According to McQuillan (5 § 19.16, p. 438), an ordinance cannot arbitrarily, oppressively, or unreasonably discriminate against nonresidents. Such an ordinance would unconstitutionally deny nonresidents equal protection of the law.

A municipal regulation which excludes nonresidents from public recreational facilities, however, is not necessarily unconstitutional. In the 1957 case of *McClain v. City of South Pasadena*, 155 Cal, App 2d423, 318 P2d 199, a municipal regulation which excluded nonresidents from the city’s pool and recreational facilities withstood an equal protection challenge. A nine-year-old black girl was refused admission after she purchased a ticket to the city pool. The city claimed she was excluded because she was a nonresident; she alleged she was excluded because of her race. At the time of the alleged violation, the City of South Pasadena had 19,000 inhabitants, none of whom were black.

In its decision, the court recited a general principle regarding the constitutionality of discriminatory municipal regulations: “All differentiation by municipal regulations as to nonresidents is not constitutionally prohibited and void. It is only when the municipal regulation discriminates unreasonably that it violates constitutional requirements.”

In this case, the court found public safety considerations provided a reasonable basis for excluding non-residents. “A regulation designed to prevent congestion in a municipal plunge (swimming pool) is a valid exercise of the police power for the health, safety, morals, and general welfare. The very nature of the plunge limits the number who may use it at one time. The purpose of the regulation is to avoid congestion in the plunge; for a proper distribution of patrons; and for the protection and health of persons using it.”

Such safety considerations, however, would not have provided a reasonable basis for excluding blacks or members of any other class based upon race, creed, color, ethnic background, or national origin. Members of minority groups belong to “suspect” classifications because these individuals have historically been victimized by discriminatory practices. Any discrimination against such groups receives “strict scrutiny” by the courts. In other words, the municipality bears the heavy burden of demonstrating a compelling state interest which justifies the discriminatory practice. In addition, the municipality must show that no other alternative exists which would have mitigated the adverse impact on the suspect class. As a result, when a suspect class is involved, it is almost impossible for the municipality to prove the reasonableness of its discriminatory action.

“RATIONAL BASIS” TEST

Nonresidents, however, are not members of a suspect class. Ordinances which discriminate against this group will be upheld if they can satisfy the “rational basis” test. In other words, the municipality must demonstrate a reasonable relationship between the regulation and legitimate governmental goals. The rational basis test, therefore, involves a much lighter burden of proof than the strict scrutiny test for suspect classes. In “McClain,” the exclusion of non residents bore a reasonable relationship to the proper and safe distribution of patrons at the pool. The court avoided any problems posed by the plaintiff’s race, finding she was “excluded because she was a nonresident not because she was black.”

The court further found that the municipality had no duty to nonresidents which would require general public access to the pool. “South Pasadena has the sovereign duty of maintaining the health of its residents. It owes no duty to nonresidents. Residents are entitled to preference over nonresidents and such action is not in contravention of the rights of nonresidents. The primary purpose of a municipality corporation is to contribute toward the welfare, health, happiness, and interest of its inhabitants . . . not to further the interests of those residing outside its limits.”

In the case of *Sea Isle City v. Caterina* 123 N.J. Super, 303 A2d (1973) the court upheld an ordinance which established a fee structure for seasonal and weekly beach passes. Seasonal passes cost \$2.50 before May 31 and \$5 after. Plaintiff challenged the fee structure on equal protection grounds, alleging discrimination against those nonresidents unable to purchase the passes before May 31.

According to the court, municipal ordinances are presumed to be constitutional until clearly proven otherwise by the party challenging it. The court further elaborated on the factors to be considered in the rational basis test for ordinances challenged by nonresidents on equal protection grounds. “The requirement of equal protection is satisfied if all persons within a class reasonably selected are treated alike. And a classification is reasonable if it rests upon some ground of difference having a real and substantial relation to the basic object of the particular enactment or on some relevant consideration of public policy . . . The Legislature has a wide range of discretion in this area and distinctions will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them.”

In this case, the court accepted the city’s argument that the May 31 out off date allowed a means to measure the number of people expected to use the beach and finance such services as lifeguards, police, and maintenance. The court, however, rejected the city’s argument that weekly badges should expire at noon on Saturday because most weekly housing rentals in the area ended at this time. This forced weekend visitors to purchase two badges rather than one. The court properly rejected this argument under the less stringent rational basis test because hotel/motel practices in the community had no demonstrable relationship to police power concerns on the city beaches.

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In the case of *McNicholas v. York Beach Village Me.*, 394 A2d 264(1978) the court struck down a permit fee of \$25 per year charged skin and scuba divers in a city park because it denied equal protection. No other user group in the park was charged a fee. Since no fundamental right guaranteed by the Constitution, such as free speech or freedom of assembly, or a suspect classification was involved, the court applied the rational basis test.

Applying this less stringent test, the court was still unable to find some rational basis for the difference of treatment among park user groups by the village. "Even assuming as we do that regulation of divers but no other park users is a rational distinction, the \$25 permit fee imposed solely upon divers is so disproportionate as to lose any rational connection to a legitimate governmental purpose. To cite an extreme example, a diver who utilizes the park once a year must pay the fee, but a tour bus operator who brings in bus loads of sightseers daily pays nothing."

The court in "McNicholas" quoted extensively from the 1978 U.S. Supreme Court Decision *Baldwin v. Fish and Game Commission of Montana* 435 U.S.371, 98 S.Ct. 1852, 56 L.Ed.2d 354. The plaintiffs in this case challenged the constitutionality of a state licensing statute which charged residents \$9 to hunt elk while requiring nonresidents to purchase a combination hunting license costing \$225. The court applied the rational basis test and upheld the statute. "We perceive no duty on the state to have its licensing structure parallel or identical for both residents and nonresidents, or to justify to the penny any cost differential it imposes in a purely recreational, noncommercial, non-livelihood setting. Rationality is sufficient."

While a state or municipality may be rather limited in its ability to restrict or exclude the business activity of nonresidents within its borders, the Court apparently found no such limitation on governmental authority for controlling nonresident recreational activity. "We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit."

CONCLUSION

While the preceding cases cannot possibly predict the outcome of future challenges to nonresident and user fee regulations in a given jurisdiction, certain judicial tendencies can be gleaned from these decisions. Courts are looking for a means to uphold rather than invalidate municipal regulations and ordinances. To reiterate, the municipality should be able to show an implied or explicit grant of authority for the activity from the state. In addition, the municipality should be able to provide data and a clearly stated rationale which demonstrates a reasonable relationship between a regulation and legitimate governmental goals. If administrators would apply their own rigorous rational basis test in the initial phases of developing a written policy on

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fee structures and the use of facilities by nonresidents, it is unlikely that courts would have to repeat the exercise.