

## AUGUST 2003 LAW REVIEW

### STATE BILLS WOULD BAN PUBLIC COMPETITION WITH PRIVATE BUSINESS

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As characterized by one state supreme court, “[t]he argument that local governments may not operate enterprises unless it can be shown that private enterprise is ‘unwilling or unable’ to engage in the proposed activity is essentially a contention that the municipal operations of the enterprise would create an unfair competition.” In response to such arguments of “unfair competition,” this court noted, as a general rule, governmental “owned and operated enterprises have been permitted to engage in head-to-head competition with privately owned companies.” *Madison Cablevision Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (N.C. 12/07/1989). Similarly, as illustrated by the cases described below, park and recreation agencies may directly or indirectly compete with recreational opportunities available through private commercial enterprises, as long as such facilities and programs provide public benefits which are expressly or impliedly authorized under state law. In 2003, two companion bills were introduced into the General Assembly of Pennsylvania, House Bill 298 (HB 298) and Senate Bill 321 (SB 321), to prohibit such “government competition with private enterprise” in an effort “to enhance the efficient provision of goods and services to the public.”

#### LEGISLATE COMPETITION PROHIBITION?

The declared policy of HB 298/SB 321 is to “protect economic opportunities for private enterprise against unfair competition by government agencies.” The Bills define “Private enterprise” as “[a]n individual, firm, partnership, joint venture, corporation, association or any other legal entity engaging in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing or advertising of goods or services *for profit*.”

According to the president and CEO of a commercial racquet and fitness club who helped draft this proposed legislation: “It is terribly unfair for local and state government to use taxpayer money to create enterprises that compete with small businesses... *including local governments building and selling memberships to golf courses, swimming pools and fitness centers.*” (Emphasis added.)

Within the context of the Bills, government competition is defined as the “provision of goods or services to the public by government agencies that are essentially the same as those offered by private enterprise.” Prohibited government competition would also include any intergovernmental or interagency agreement which subsidizes “any charitable or not-for-profit institution which would use such support to compete against private enterprise.”

Existing government competition with private enterprise is permitted to continue under HB 298/SB 321, but “may not exceed the scope of the competition” that would exist on the effective date, should these Bills become law. In addition, there is an exception in the Bills for “[t]he development, management and operation of State parks, historical monuments and hiking or equestrian trails.”

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The Bills also provide an exception for “government functions” and “essential services.” Government functions include the operation of a governmental agency or department and the “fulfillment of the legal obligations of the agency.” Essential services include, but are not necessarily limited to, “water supply, sewers, garbage and trash removal, recycling, utilities, streets and roads, public transportation and public transportation infrastructure and State and local correctional facilities.” However, if private industry can provide essential services, the Bill would require government agencies and authorities to “entertain bids from private enterprise and, if practicable, contract with private enterprise to provide essential services.”

Under the proposed legislation, those individuals or entities alleging that “a government agency is participating in commercial activity resulting in competition with private enterprise” could petition a state court to issue an injunction ordering the agency to “abate the government competition with private enterprise.” Moreover, plaintiffs may seek an order prohibiting such activity while a claim of unfair competition is pending in the court, if they can show that a government agency “is or is planning to participate in commercial activity” and “the threat to private enterprise or public moneys is imminent.” In so doing, the Bills would not require plaintiffs to show that they will “suffer irreparable harm” from the alleged unfair competition.

In addition to an order to abate government competition with private enterprise, a court may award monetary damages to plaintiffs who “prove actual damages by clear and convincing evidence.” Moreover, plaintiffs who obtain a favorable settlement or judgment this proposed legislation will be entitled to recover “the actual costs of the suit, including, but not limited to, reasonable attorney fees and all expenses and disbursements made by the plaintiff in bringing the action.”

### BEYOND STATUTORY AUTHORITY?

If HB 298 or SB 321 becomes law in Pennsylvania, it would effectively reverse the generally applicable principles of law and the reasoning of the courts for future situations involving governmental competition with private enterprise. These principles and reasoning are illustrated by the case of *Yorktowne Tennis Club, Inc. v. York Township*, 44 Pa. D. & C.3d 430 (1987); affirmed, 120 Pa.Cmwlth. 13; 548 A.2d 357 (1988). In this particular instance, plaintiff’s tennis club and the township’s newly acquired tennis and fitness facility both offered the same services, i.e., indoor and outdoor tennis, aerobics, dance classes, whirlpool, pro shop, tennis lessons and tournaments, and racquetball. Moreover, the Club and the Township user fees were identical, although the Township court fees are on the average about a dollar less.

The Club claimed that it was illegal for the Township’s tax monies to be “used to compete in a private business against Yorktowne Tennis Club Inc.” Specifically, the Club argued that the township’s operation of a similar facility was “not a public use because it is not a necessity to the community, nor is there an absence of active competition, nor is there otherwise a difficulty in obtaining tennis and swimming facilities.”

Rather than entertaining arguments “founded in common sense” or “public acquiescence,” the court found itself constrained to determine whether “the township’s activities were beyond the

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letter of its authority.” As noted by the court, “[w]ithout express legislative sanction, townships do not have authority to engage in an independent business operation or enterprise such as is usually pursued by private individuals.” In this particular instance, however, the court found state law authorized the Township to “make, enlarge and maintain public parks, recreation areas and facilities.”

While noting that “courts are inclined to defer to the wisdom and discretion of the state Legislature as to whether a challenged activity is a public service,” the court in this case was not persuaded that the Township’s facility was necessarily “beyond the legislatively permitted activities of making, enlarging and maintaining public parks, recreation areas and facilities.” According to the court, “the Legislature could have enacted such limitations if the limitation were intended.” The court, therefore, denied the Club’s request for a court order prohibiting operation of the Township’s tennis and fitness facility. In affirming this decision, the appeals court held that “such competition is permitted... in the absence of any legislative intent to prohibit such competition.” (See September 1993 NRPA Law Review entitled: *Authorized Public Recreation May Legally Compete with Private Facilities*)

### PUBLIC/CHARITABLE PURPOSE?

In a later Pennsylvania case, *Dynamic Sports Fitness Corp. of America, Inc. v. Community YMCA of Eastern Delaware County*, 768 A.2d 375, 768 A.2d 375 (Pa.Comm. 02/01/2001), a commercial sports club claimed the YMCA’s planned expansion of its health club facilities would create “indirect competition” with the sports club. In so doing, the sports club claimed the Y’s “state-of-the-art health club” was not a charitable purpose within the Y’s tax exempt status as a public charity. In rejecting this claim, the court found “the YMCA’s promotion of ‘physical health’ is related to and intertwined as an integral part with its general charitable mission” because “programs, such as cardiovascular workouts... maintain physical wellness.”

We have no hesitation in saying that athletic programs and facilities may serve a charitable purpose; they not only benefit the physical health of participants but improve the quality of life in a community.... In this respect, an athletic center serves a purpose similar to the civic theater .... Both athletics and the theater are important cultural expressions that promote emotional, mental, and, in the case of athletics, physical well-being. The golden age of ancient Greece is remembered both for Sophocles and the Olympic games. It would be arbitrary to say that art deserves more support than sports; the two involve different dimensions of the life of the individual as well as the community. The public interest demands that the community offer both outlets to the creative energies of its citizens.

In determining that “athletic programs and facilities may serve a charitable purpose,” the court went on to compare such charitable purposes of the Y to public purposes provided by public park and recreation agencies.

In this regard, we note that nearly all cities of any size have a parks and recreation department with responsibility to maintain playing fields and other athletic facilities.... We see no clear distinction between athletic activities and physical

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fitness programs. One of the public benefits of athletics lies in promoting physical health; and physical activities often have an element of play similar to athletics. ...[O]ur municipal parks sometimes provide jogging paths or exercise stations. To the extent that physical fitness programs place particular emphasis on the goal of health, they equally serve a charitable purpose.... The physical education programs in our schools and the existence of a President's Council on Physical Fitness attest to the social interest in cultivating physical strength and vigor among our citizens.

### PUBLIC HEALTH PROMOTION?

While acknowledging that the term “public purpose is not capable of a precise definition,” the state appellate court in the case of *Northland Racquetball v. Bemidji State University*, No. CX-94-1621 (Mn.App. 1995) found the term has generally been construed by courts “to mean an activity that benefits the community as a body and is directly related to the functions of government.” In this particular case, plaintiff asserted that “Bemidji State's sale to the public of memberships to its recreational center” violated the state constitution and forced him to close his business. In rejecting plaintiff’s claim, the court held that “Bemidji State benefitted the public by making a fitness and recreational center available at a modest charge because it provided recreation and promoted the physical health and fitness of community members.” Moreover, in the opinion of the court, “making the facility available to the public” was “directly related to the governmental function of promoting public health” and, thus, well within the broad statutory authority of this state university.

### AUTHORIZED PUBLIC PURPOSE?

In the case of *Siegel v. City of Branson*, 952 S.W.2d 294 (Mo.App. 1997), plaintiff contended that the operation of a public campground which competed with a nearby private business was beyond the statutory authority of the City to operate a park or recreational facility. In rejecting plaintiff’s argument, the court noted that “[a] municipal purpose is one which comprehends all activities essential to the comfort, convenience, safety and happiness of the citizens of the municipality.” Further, the court acknowledged that this concept of what constitutes a public purpose is “elastic and keeps pace with changing conditions.”

That a municipality competes with private enterprise is not decisive if the municipality is engaging in activities that are in the public interest and for a public purpose. Whether the activity is proper is not determined by whether private businesses are engaged in the same activity as the municipality. What constitutes a public purpose is primarily a legislative decision which will not be overturned by the courts unless arbitrary and unreasonable. Missouri courts will defer to a city council when it declares a particular purpose to be a public one, and not interfere with a discretionary exercise of judgment unless it is clearly erroneous or unreasonable... No hard and fast rules exist for determining whether specific uses and purposes are public or private... Thus, a definition of public purpose will likely vary with the character of the case in which the term is employed.

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In this particular instance, the court concluded that the public campground was a “recreational” area within the scope of the state statute authorizing the City operate public parks and other recreational areas. In so doing, the court found the campground was recreational and included park-like portions. Moreover, the court noted that “[c]harging for its use, and perhaps making a profit, and restrictions upon entry after certain hours does not prevent the area from being recreational.”

Whether the City is engaged in a proper activity is not determined by whether it competes with private businesses, but whether it is an authorized public purpose. Here, the City is engaged in an authorized recreational activity and competing with private businesses does not prohibit the City from doing so.

If it is in the public interest and for a public purpose, a city may be authorized by the state to engage in a business commonly carried on by private enterprise; and in such case such city may levy a tax to support such business and compete with private interests engaged in a like activity.