

N.D.A.G. Letter to Sillers (March 25, 1992)

March 25, 1992

Mr. Cameron D. Sillers
State's Attorney
Cavalier County
908 Third Street
Langdon, ND 58249

Dear Mr. Sillers:

Thank you for your February 24, 1992, letter in which you asked my opinion as to whether the Walhalla Country Club, which is a golf course open to the public, is qualified to obtain a special Sunday alcoholic beverage permit issued pursuant to N.D.C.C. § 5-02-05.1.

N.D.C.C. § 5-02-05.1(1) provides:

1. Any city or county may issue a special Sunday alcoholic beverage permit to a private club, lodge, restaurant, motel, or hotel licensed as a retail alcoholic beverage establishment under chapter 5-02; or to a publicly owned or operated facility. A county may not issue a permit under this section to a private club, lodge, restaurant, motel or hotel located within the geographical boundaries of a city.

North Dakota Century Code (N.D.C.C.) tit. 5 pertaining to alcoholic beverages does not define the term "private club." N.D.C.C. § 5-02-05.1 was originally adopted by the 1979 Legislative Assembly. 1979 N.D. Sess. Laws, ch. 112, § 2. Although the term "private club" was included within the original legislation, examination of the legislative history fails to disclose specific reference to this term and its definition.

Words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Unless words are statutorily defined, such words are to be given their plain, ordinary, and commonly understood meaning. Kim-Go v. J. P. Furlong Enterprises, Inc., 460 N.W.2d 694 (N.D. 1990). The statute should be construed so that an ordinary person reading the statute would get the usual and accepted meaning. Wills v. Schroeder Aviation, Inc., 390 N.W.2d 544 (N.D. 1986).

Although a dictionary may not specifically define the term "private club," the term "private" has a commonly understood and accepted meaning. The term "private" has been defined as:

Affecting or belonging to private individuals as distinct from the public generally.

BLACKS LAW DICTIONARY 1195 (6th Ed. 1990)

- (1) Of, belonging to, or concerning a particular person or group; not common or general. (2) Not open to, intended for, or controlled by the public.

Webster's New World Dictionary of the American Language, 1131 (2nd College Ed. 1982).

Courts have construed the term "private club" in contexts other than alcohol beverage licensing. In Rogers v. International Assoc. of Lions Clubs, 636 F.Supp. 1476 (E.D.Mich. 1986), the court held that the Lions Club was not a private club under a Michigan civil rights statute. The court reviewed various federal cases discussing factors to be considered in deciding when a club is private. These factors included the organization's size, selectivity of membership, public services offered, and use of public facilities. In ruling that the Lions Club was a public rather than private club, the court determined that the application procedure for membership in the club was not selective. The court stated, at 1480:

The essence of privacy is selectivity. If there is little or no selectivity, there is no basis to claim privacy.

The court also concluded that the Lions Clubs were public in terms of the services they provided to others and to their members and that the club was dedicated to public service and offered it in public places.

In U.S. Power Squadrons v. State Human Rights Appeal Bd. 84 A.D.2d 318, 445 N.Y. S.2d 565 (1981), aff'd in 59 N.Y.2d 401, 465, N.Y.S.2d 871, 452, N.E.2d 1199 (1983), the court concluded, in a sex discrimination case, that the plaintiff, a motor boating organization, was not private. Although the organization was controlled by its members, the court held that an organization which admits members based upon objective and not subjective criteria may not be considered a private club. If nearly everyone who applied for membership is accepted, the club may not be considered private.

Selectivity of membership appears to be a substantial factor in determining whether a club is private or public. In Brown v. Loudoun Golf and Country Club Inc., 573 F.Supp. 399 (E.D.Va. 1983), the court held that a golf club, although it was a nonprofit corporation in which all members were shareholders, was not a private club because its membership procedures did not create a truly selective membership. The court in Olzman v. Lakehill Swim Club, Inc., 495 F.2d 1333 (2nd Cir. 1974), concluded that a swim club was not a "private club" within the public accommodations provision of the civil rights law found at 42 U.S.C. § 2000a since there was no plan or purpose of exclusiveness in its membership procedures.

If the Walhalla Country Club is, as you state in your letter, a golf course which is open to the public, it is likely that the country club is not a "private club" within the provisions of N.D.C.C. § 5-02-05.1. Applying the accepted and commonly understood definition of the term "private" and cases from courts of other jurisdictions which have construed what is

and what is not a "private club," it would appear, without going further into the factual background of the operation, membership policies, and the selectivity procedures for accepting new members, that the country club is not a "private club."

An applicant for a liquor license or authority to dispense alcoholic beverages generally has the burden of proving every material fact necessary to entitle that applicant to receive the privilege afforded by that license. State Alcoholic Beverage Control Bd. v. Decker, 700 P.2d 483 (Alaska 1985). If the Walhalla Country Club, as an applicant for a N.D.C.C. § 5-02-05.1 Sunday alcoholic beverage permit can satisfy your county commission that it is in fact a "private club," it may qualify for that permit. However, absent sufficient facts presented by the country club to establish that it is a "private club" within the accepted and commonly understood meaning of that term, the club could not qualify for this permit as a "private club." In such case, the country club must qualify under one of the other establishments or facilities authorized to apply for, and receive, a N.D.C.C. § 5-02-05.1 Sunday permit.

I hope that I have adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

jfl