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New Jersey's Newly Enacted Open Container Statute

The Amendment reflects our legislature's commitment to Home Rule, the undergirdings of which are confidence that local government is best suited to determine what is best for its citizenry.

By **Stephen Hankin** | March 25, 2022



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Effective Jan. 18, 2022, the New Jersey Legislature enacted an amendment to N.J.S.A. 40:48-1 delegating to municipalities the specific authority to “[d]esignate an open container area upon which people are permitted to carry and consume open containers of alcoholic beverages outdoors pursuant to ... [N.J.S.A.]33:1-24.4.” N.J.S.A.40:48-1(35). The reference to the contemporaneously enacted N.J.S.A. 33:1-24.1 (“the Amendment”) is to the New Jersey Alcoholic Beverage Control Act (“the Act”), which contains several significant provisions respecting Home Rule.

The Significant Provisions

First, an “open container area” is defined as *either* a portion or the entirety of a municipality where persons over the age of 21 can carry and consume open containers of alcoholic beverages outdoors.

Second, a condition precedent to a municipality’s authority to designate an open container area is the adoption of an enabling ordinance. Despite N.J.S.A. 40:49-2(b), which requires a public hearing for the passage of any ordinance, the Act nonetheless recites the need for one and is duplicitous in this respect. The requirement for the passage of an ordinance could be the result of a 2020 Executive Order issued by the Mayor of Atlantic City authorizing the consumption of alcoholic beverages on the boardwalk and other areas.

Third, the Amendment is deemed effective “[n]otwithstanding any other provision of law to the contrary ...” and thus has preemptive effect.

Finally, *only the sale* of alcoholic beverages for consumption within open container areas—as distinct from the location of open container areas themselves—is subject to other provisions of the Act, rules and regulations promulgated by the Director of the Division of Alcoholic Beverage Control (ABC), and municipal ordinances.

To some practitioners the Amendment is redundant because N.J.S.A. 40:48-2 already provides municipalities with the authority to enact ordinances they deem necessary for the preservation of their inhabitants’ welfare. See *Thorne v. Casale*, 101 N.J. 418 (E. & A. 1925) (noting the ability of municipalities to regulate places where food and drink are sold because of the importance of Home Rule). However, the Amendment makes clear that municipalities, and only municipalities, albeit by ordinance, have the power to designate open container areas. The Act thus refines municipal power to permit consumption on public lands without State interference. This includes interference under current regulations by the ABC.

Current Non-Conflicting ABC Regulations

Existing ABC regulations do not conflict with the Amendment. For example, retail distribution licensees—that is, packaged goods stores—cannot permit open containers within their “licensed premises” under N.J.S.A. 33:1-12(3)(a) and N.J.A.C. 13:2-23.11(a), which make no mention of any proscription about adjacent public lands. Given the nature of packaged goods stores, the licensed premises cannot include outdoor public lands over which the licensee has no right, title, interest or control. Indeed, N.J.A.C. 13:2-9.3 requires that each such licensee “must have and maintain a continuing possessory interest and control of the license premises. See *Essex County Retail Liquor Stores Association v. Municipal Board of Alcoholic Beverage Control*, 64 N.J. Super. 314, 321 (App. Div. 1964) (noting a distribution license is restricted to “the square footage specified in the license application”).

Moreover, “premises” are defined as: “The *physical* place at which a licensee is or may be licensed to conduct and carry on the manufacture, distribution or sale of alcoholic beverages.” (Emphasis added.)

Additionally, despite 33 independent regulations governing the use of licensed premises, N.J.A.C. 13:2-23.1 to 23.33, not a single regulation purports to require distribution licensees to control or be responsible for anything that occurs on adjacent public property.

"In establishing New Jersey's system of liquor control, the Legislature widely recognized the importance of varying local sentiment." *Borough of Fanwood v. Rocco*, 33 N.J. 404, 412 (1960). This includes the municipal authority to "'license ... package stores in designated areas ...' because '[t]he interests of effective liquor control are best advanced where the municipal licensing program displays fair regard ... for the convenience of residents who purchased alcoholic beverages [as well as] for the sentiments of residents who are unsympathetic or hostile to this sale.'" *Id.*

Just as when "a municipality decides in good faith that a substantial area within its boundaries in which there are no taverns or package stores shall remain that way," *Borough of Fanwood, supra*, 59 N.J. at 320, other than within the licensed premises themselves, the Amendment permits no governmental body to interfere with a municipality's determination of where consumption can occur on public lands. See *Ward v. Scott*, 16 N.J. 16, 23 (1954) (noting that local officials who are thoroughly familiar with their community's characteristics and interests are best equipped to make decisions impacting their residents).

Conclusion

As municipalities can only exercise legislatively granted powers, *City of East Orange v. Board of Water Comm'rs of City of East Orange*, 41 N.J. 6 (1962), the Amendment serves to refine, if not grant, municipalities the authority to control the consumption of alcohol on public lands. Indeed, if our legislature intended to vest the Division—or, for that matter, any other agency—with the authority to designate the location of "open container areas," it clearly would have said so. And, lest we forget, our State Constitution requires the liberal interpretation of statutes in favor of "local power to deal with local needs." *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 251 (1965).

In sum, the Amendment reflects our legislature's commitment to Home Rule, the undergirdings of which are confidence that local government is best suited to determine what is best for its citizenry and that all municipalities, whether dubbed as towns, cities, boroughs or villages, should enjoy the identical grant of power from the State.

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