

THE RALPH & LORI PAGE

SMITH RODGERS & STRICKLAND

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Of Counsel

More Thoughts from Uncle Ralph

December 31, 2009

“Never Yawn With Your Head under Water”

Thanks to Ms. Lori Sykes

Public Safety Attorney

Winston Salem Police and Fire Departments

For Her Help, Assistance, Collaboration, Cooperation and Support

In the Writing of This Edition of “Ralph’s Page”

INFORMATION ON NORTH CAROLINA’S

SMOKING BAN

EFFECTIVE 12:01 A.M.

JANUARY 2, 2010

There are two Appendices attached hereto: the first lists the elements of the charge of smoking in an enclosed area of a bar or restaurant, with samples of written citations; and the second contains the actual statutes of these new laws as passed by the General Assembly, along with the appropriate definitions. Lucky you.

WHAT IS BANNED?

- * **Cannot smoke in “enclosed areas” of most restaurants and bars**
- * **Cannot smoke in most “enclosed areas” of lodging establishments (hotels, motels, Bed & Breakfasts, etc.) IF the establishment prepares and serves food or drink AND EXCEPT for rooms designated as smoking rooms.**

WHAT IS AN “ENCLOSED AREA?”

An area is enclosed if it has: (1) a roof overhead covering; and (2) walls or wall coverings including canvas on all sides or on all sides except one.

ARE ANY PLACES EXEMPT?

Yes:

(1) non-profit private clubs and country clubs (if uncertain, ask management if club is non-profit and see proof);

2) restaurants exempt from sanitation laws – examples include a curb market operated by the State agricultural extension service and restaurants that serve only drinks in single service containers;

(3) cigar bars;

(4) lodging establishments that do not serve drinks or food for money (i.e., they can have vending machines but don't have snack bars, restaurants, etc.).

Maybe: Careful here - Some places that sell food have to be inspected by the Health Department and some do not – examples of places that do not have to be inspected are convenience stores and bowling alleys. Only those that have to be inspected are subject to the smoking ban. If you

are asked about whether the smoking ban applies in a convenience store, bowling alley or similar place, ask management if they are subject to health inspections; look for posted health inspection placard.

ENFORCEMENT AGAINST SMOKING PATRONS:

Restaurant/Bar Owner or Management: Initial responsibility for enforcement is with the owner, manager or staff of the bar, restaurant or lodging establishment. They must ask any patron who is smoking to go outside or to put the cigarette out. If the patron refuses, they may choose to ask them to leave the establishment and/or they can call local law enforcement.

Local law enforcement: If YOU are called, YOU can issue a citation to the smoker under NCGS 130A-496(a) and 497(b) ONLY IF the smoker continues to smoke after getting verbal or written notice to stop by the owner/manager. You should use your discretion as to whether a citation is necessary, though we would expect that you not issue a citation if the person is not smoking when you get to the location. Just provide that person with a small discussion of the law if he is allowed to remain on the premises by the manager. If you must issue a citation, remember that the violation is:

- * an INFRACTION with a potential \$50 fine**
- * NOT a misdemeanor; NOT subject to arrest**
- * NOT subject to any court costs and**
- * a WAIVEABLE offense (it may be paid by mail).**

Even if you choose not to issue a citation, you may unfortunately end up with a charge and an arrest for assault,

trespass or RDO depending on the circumstances. Do all that is in your power not to have to make an arrest in this situation; it is only a INFRACTION to begin with - but, if you're left no choice, proceed with an arrest.

- **Also, only local law enforcement has authority to enforce this statute – not ABC or ALE or other state law enforcement officers. Therefore, enforcement is limited to “local” efforts and “local” efforts alone.**

ENFORCEMENT AGAINST ESTABLISHMENTS:

Only the Public Health Department has authority to take enforcement action against the establishment itself when it does not follow the smoking ban. If a covered establishment is not in compliance, members of the public are asked to report the violation by calling 1-800-662-7030 (North Carolina Department of Health and Human Services CARE-LINE). Information provided through this compliance line will be forwarded to the local health department. Beginning January 2, 2010, complaints may also be made online at

<http://www.smokefreenc.gov>.

When you are aware that a violation exists by management you should write a report to the head of your agency. Your Command Staff should then discuss compliance with the bar or restaurant owner or manager prior to filing a formal complaint with the Health Department or the North Carolina Department of Health and Human Services. We believe that a complaint by a member of a local law enforcement agency to a county health department that could ultimately result in the closure of a bar or restaurant should be made by a Chief of Police or a Sheriff or a member of their Command Staff, and not any other person.

QUESTIONS:

From talking many attorneys and friends who own or work in restaurants and bars, we know that there is much confusion out there as to what this law says. Please use this memo to help answer questions concerning this new law.

OUR ADVICE

This is a new and very controversial law. It will be popular with some and reviled by many. If you are called to a situation involving a violation, it will probably already be contentious when you arrive. As with all new laws, let's begin by using our enormous capacity to calm a situation, then educating that person, explaining to him the wishes and dictates of management in this particular situation and ensuring his compliance.

In many cases, as you well know, angry people will listen to you, calm down and obey your commands. Let's do all we can to calm situations, settle disputes over this law and do what we can so that patrons understand that it is not management's policy but STATE law – perhaps then the patron will return and continue to be a regular client of that food service business. If we can do that without having to write a citation or make an arrest we will be very, very successful.

Make this YOUR policy - to calm, correct, educate and reasonably settle disputes. You and your community will be much the better off for it.

APPENDIX 1

Writing the Citation

The Elements

A person responsible for this offense

- 1. continues to smoke**
- 2. in an enclosed area**

- 3. after being warned to stop by a person in charge of the area (or the person's designee)
3. of a restaurant or bar.**

The Written Charge

... willfully and knowingly did smoke a (cigarette, pipe, cigar or name another smoking implement) after being warned to stop by a person in charge of the area (or the person's designee) an enclosed area of a (name a restaurant or bar and give business address), an infraction, in violation of G.S. 130A-496(a) and 497(b).

Sample Charge

... willfully and knowingly did smoke a bong after being warned to stop by Brian Beasley, manager, bartender and bouncer, in an enclosed area of the Smith+Rodgers&Strickland Chug-a-Lug Hashery, a bar, on Alan Leonard Boulevard, Drusylla, NC, an infraction, in violation of G.S. 130A-496(a) and 497(b).

APPENDIX 2

The New Statute

"§ 130A-496. Smoking prohibited in restaurants and bars.

(a) Notwithstanding Article 64 of Chapter 143 of the General Statutes, smoking is prohibited in all enclosed areas of restaurants and bars, except as provided in subsection (b) of this section.

[COMMENT: Paragraph (a) is the prohibition of smoking in bars and restaurants. All else is an exception or explanation. See also 497(b).]

(b) Smoking may be permitted in the following places:

- (1) A designated smoking guest room in a lodging establishment. No greater than twenty percent (20%) of a lodging establishment's guest rooms may be designated smoking guest rooms.
- (2) A cigar bar if smoke from the cigar bar does not migrate into an enclosed area where smoking is prohibited pursuant to this Article. A cigar bar that begins operation after July 1, 2009, may only allow smoking if it is located in a freestanding structure occupied solely by the cigar bar and smoke from the cigar bar does not migrate into an enclosed area where smoking is prohibited pursuant to this Article. To qualify under this subsection, the

cigar bar must satisfactorily report on a quarterly basis to the Department, on a form prescribed by the Department, the revenue generated from the sale of alcoholic beverages and cigars as a percentage of quarterly gross revenue. The Department shall determine whether any additional documentation is required of the cigar bar to authenticate or verify revenue data submitted by the cigar bar. This subdivision shall not apply to any business that is established for the purpose of avoiding compliance with this Article.

(3) A private club.

"§ 130A-497. Implementation and enforcement.

(a) A person who manages, operates, or controls a restaurant or bar in which smoking is prohibited shall:

(1) Conspicuously post signs clearly stating that smoking is prohibited. The signs may include the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.

(2) Remove all indoor ashtrays and other smoking receptacles.

(3) Direct a person who is smoking to extinguish the lighted tobacco product.

(b) Continuing to smoke in a nonsmoking area described in this Part following oral or written notice by the person in charge of the area or the person's designee constitutes an infraction, and the person committing the infraction may be punished by a fine of not more than fifty dollars (\$50.00).

(c) Conviction of an infraction under this section has no consequence other than payment of a penalty. A person found responsible for a violation of this section may not be assessed court costs.

(d) Notwithstanding G.S. 130A-25, a violation of this Part shall not be punishable as a misdemeanor.

(e) Administrative penalties imposed under G.S. 130A-22(h1) against a person who manages, operates, or controls a restaurant or bar and fails to comply with the provisions of this Article and the rules adopted by the Commission to implement the provisions of this Article shall only be enforced by a local health director.

(f) The Commission shall adopt rules to implement the provisions of this Article.

"§ 130A-492. Definitions.

The following definitions apply in this Article:

(1) "Bar". – An establishment with a permit to sell alcoholic beverages pursuant to subdivision (1), (3), (5), or (10) of G.S. 18B-1001.

(1a) "Cigar bar". – An establishment with a permit to sell alcoholic beverages pursuant to subdivision (1), (3), (5), or (10) of G.S. 18B-1001 that satisfies all of the following:

a. Generates sixty percent (60%) or more of its quarterly gross revenue from the sale of alcoholic beverages and twenty-five percent (25%)

or more of its quarterly gross revenue from the sale of cigars;

b. Has a humidor on the premises; and

c. Does not allow individuals under the age of 21 to enter the premises.

Revenue generated from other tobacco sales, including cigarette vending machines, shall not be used to determine whether an establishment satisfies the definition of cigar bar.

(1b) "Employee". – A person who is employed by an employer, or who contracts with an employer or third person to perform services for an employer, or who otherwise performs services for an employer with or without compensation.

(2) "Employer". – An individual person, business, association, political subdivision, or other public or private entity, including a nonprofit entity, that employs or contracts for or accepts the provision of services from one or more employees.

(3) "Enclosed area". – An area with a roof or other overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one.

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(4) "Grounds". – An unenclosed area owned, leased, or occupied by State or local government.

(5) "Local government". – A local political subdivision of this State, an airport authority, or an authority or body created by an ordinance, joint resolution, or rules of any such entity.

(6) "Local government building". – A building owned, leased as lessor, or the area leased as lessee and occupied by a local government.

(7) "Lodging establishment". – An establishment that provides lodging for pay to the public.

(8) "Local vehicle". – A passenger-carrying vehicle owned, leased, or otherwise controlled by local government and assigned permanently or temporarily by local government to local government employees, agencies, institutions, or facilities for official local government business.

(8a) "Private club". – A country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member's guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1). For the purposes of this Article, private club includes country club.

(8b) "Private residence". – A private dwelling that is not a child care facility, as defined in G.S. 110-86(3), and not a long-term care facility, as defined in G.S. 131E-114.3(a)(1).

(8c) "Private vehicle". – A privately owned vehicle that is not used for commercial or employment purposes.

(8d) "Public place". – An enclosed area to which the public is invited or in which the public is permitted.

(8e) "Restaurant". – A food and lodging establishment that prepares and serves drink or food as regulated by the Commission pursuant to Part 6 of Article 8 of this Chapter.

(9) "Smoking". – The use or possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product.

(10) "State government". – The political unit for the State of North Carolina, including all agencies of the executive, judicial, and legislative branches of

government.

(11) "State government building". – A building owned, leased as lessor, or the area leased as lessee and occupied by State government.

(12) "State vehicle". – A passenger-carrying vehicle owned, leased, or otherwise controlled by the State and assigned permanently or temporarily to a State employee or State agency or institution for official State business.

(13) "Tobacco shop". – A business establishment, the main purpose of which is the sale of tobacco, tobacco products, and accessories for such products, that receives no less than seventy-five percent (75%) of its total annual revenues from the sale of tobacco, tobacco products, and accessories for such products, and does not serve food or alcohol on its premises.