



# Smoking in Public Places: Recent Changes in State Law

Aimee Wall

On May 19, 2009, Governor Perdue signed legislation that makes significant changes to the state laws governing smoking in public places.<sup>1</sup> The law creates new statewide prohibitions and also expands local authority to adopt local smoking laws. This bulletin is divided into three sections. The first section provides some background and history on the evolution of smoking laws in North Carolina. The second section discusses the smoking prohibitions that apply statewide both now and after the new law goes into effect. The third section focuses on the expanded authority of local governments to regulate smoking within their jurisdictions. The appendix includes some of the key definitions found in the new law.

## Background

In 1993, the legislature enacted a smoking law that, subject to some exceptions, *required* state and local government buildings to allow smoking in government buildings.<sup>2</sup> It also severely restricted the authority of local governments to adopt ordinances, board of health rules or policies regulating smoking within their jurisdictions.<sup>3</sup> For example, local governments were required to allow smoking in local government buildings, unless it was physically impracticable to do so, and they were not permitted to regulate smoking in restaurants, bars and other public places. Over time, the 1993 law was incrementally amended to allow local regulation of smoking in a limited number of locations, such as buildings housing local departments of social services and the grounds surrounding those buildings.<sup>4</sup>

In 2006, the tide started to turn across the country and in North Carolina on the issue of smoking regulation. In June, the U.S. Surgeon General issued a report that concluded “there is no risk-free level

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Aimee Wall is a School of Government faculty member who specializes in public health law.

1. S.L. 2009-27.

2. G.S. Chapter 143, Article 64.

3. G.S. 143-601.

4. S.L. 2005-19; S.L. 2005-168.

of exposure to secondhand smoke.”<sup>5</sup> In July, the N.C. General Assembly enacted a law prohibiting smoking in the legislative buildings.<sup>6</sup> Then beginning early in the 2007 term, the legislature considered a flurry of bills addressing exposure to secondhand smoke and regulation of smoking.<sup>7</sup> It considered but ultimately rejected legislation that would have prohibited smoking in many public places and workplaces.<sup>8</sup> It did, however, pass legislation prohibiting smoking in state government buildings<sup>9</sup> and long-term care facilities<sup>10</sup> and authorizing local governments to regulate smoking in local government buildings.<sup>11</sup> It also passed legislation directing local boards of education to adopt policies prohibiting tobacco use on elementary and secondary school property and at school events.<sup>12</sup>

In 2008, the General Assembly enacted legislation to prohibit smoking in state vehicles and to allow local governments to regulate smoking in their vehicles.<sup>13</sup> It also added new language to the laws governing community colleges to expressly authorize the boards of trustees of community colleges to adopt, implement and enforce a written policy prohibiting tobacco use on college property and at college-sponsored events.<sup>14</sup>

The following discussion offers a legal analysis that integrates these historical changes with the new law that passed in the 2009 session. The first section addresses the smoking laws that apply statewide. The second section addresses local governments’ authority to impose additional regulations, above and beyond statewide prohibitions.

## Statewide Prohibitions

### Is smoking currently prohibited anywhere under state law?

Yes. Smoking is currently prohibited in state government buildings, state vehicles, schools, prisons, and long-term care facilities. These prohibitions remain in place after the new law goes into effect January 2, 2010.

*Inside state government buildings:*<sup>15</sup> Smoking is currently prohibited inside state government buildings. A “state government building” is a building owned, leased as lessor (i.e., landlord), or the area leased as lessee (i.e., tenant) and occupied by a political unit for the State of North Carolina, including all agencies of the executive, judicial, and legislative branches of government.

- Exception: Smoking is permitted inside the area of a state government building that is being used for medical or scientific research to the extent that smoking is an integral part of the research.

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5. U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 11* (June 27, 2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/> (last visited May 18, 2009).

6. S.L. 2006-176 (adding new G.S. 143-597).

7. See Aimee N. Wall, *Regulation of Smoking: Update on Recent State Legislation*, HEALTH LAW BULLETIN No. 87 (Sept. 2007).

8. H 259.

9. S.L. 2007-193, as amended by S.L. 2007-484 (sec. 31.7).

10. S.L. 2007-459.

11. S.L. 2007-193, as amended by S.L. 2007-484 (sec. 31.7).

12. S.L. 2007-193.

13. S.L. 2008-149.

14. S.L. 2008-95 (adding new G.S. 115D-20.1).

15. G.S. 130A-493.

- **Administration:** The individual in charge of the building must post no smoking signs in conspicuous areas of the building. State psychiatric hospitals must also (1) direct smokers to extinguish cigarettes, cigars and other lighted items and (2) notify individuals when they are admitted that smoking is prohibited and obtain the individual's signature acknowledging receipt of the notice.<sup>16</sup>
- **Enforcement:** Unlike other public health law violations, a violation of this law is not a misdemeanor. This prohibition could be enforced administratively against state employees (e.g., personnel action). Alternatively, the state could pursue an injunction against a smoker pursuant to GS 130A-18.

*Inside state vehicles:*<sup>17</sup> Smoking is currently prohibited inside state vehicles. A "state vehicle" is 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.

- **Administration:** One or more no smoking signs must be placed in conspicuous areas of the vehicle. No sign is required, however, if the vehicle is used for undercover law enforcement operations.
- **Enforcement:** Unlike other public health law violations, a violation of this law is not a misdemeanor. This prohibition could be enforced administratively against state employees (e.g., personnel action). Alternatively, the state could pursue an injunction against a smoker pursuant to GS 130A-18.

*Elementary and secondary schools:*<sup>18</sup> Local boards of education are required to have policies in place prohibiting the use of tobacco products (which includes smoking) (1) in school buildings, (2) in school facilities, (3) on school campuses, (4) in or on any property owned by the local school administrative unit, and (5) at school-sponsored events at other locations when in the presence of students or school personnel.

- **Exception:** The policy may allow for the use of tobacco products in instructional or research activities if the activity is (1) conducted or supervised by faculty and (2) does not include smoking, chewing or otherwise ingesting the product.
- **Administration:** The policy must provide for posting of appropriate signs and adequate notice to students, parents, the public and school personnel.
- **Enforcement:** The policy must include requirements that school personnel enforce the prohibition.

*Prisons:*<sup>19</sup> The use of tobacco products is currently prohibited inside state correctional facilities.

- **Exception:** Tobacco products may be used for authorized religious purposes.

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16. After the new law goes into effect, people in charge of all state government buildings – not just psychiatric hospitals – will need to direct smokers to extinguish cigarettes and other lighted items. The requirement to provide notice will still only apply to psychiatric hospitals. S.L. 2009-27 (amending G.S. 130A-493(c)).

17. G.S. 130A-493.

18. G.S. 115C-407.

19. G.S. 148-23.1. Legislation is pending that, if enacted, would expand this law to prohibit the possession of any tobacco products on the premises of a correctional facility (other than tobacco products used for religious purposes). See S 167 (approved by the Senate on May 11, 2009).

- Administration: The NC Department of Correction has adopted policies and procedures implementing this prohibition.<sup>20</sup>
- Enforcement: Inmates and employees violating the law may be subject to disciplinary measures.<sup>21</sup> Visitors violating the law may be subject to removal from the facility and the loss of visitation privileges.

*Long-term care facilities:*<sup>22</sup> Smoking is currently prohibited in long-term care facilities, which includes nursing homes, adult care homes, rest homes, and facilities licensed under Chapter 122C to provide services for mental health, developmental disabilities or substance abuse.<sup>23</sup> Home care agencies are also required to prohibit their employees from smoking in a patient's home.

- Administration: The facility must (1) conspicuously post no smoking signs, (2) direct smokers to extinguish products, and (3) notify individuals when they are admitted that smoking is prohibited and obtain the individual's signature acknowledging receipt of the notice.
- Enforcement: The NC Department of Health and Human Services (DHHS) is authorized to fine a facility up to \$200 for each violation.

### **How does the new legislation change state law? Where will smoking be prohibited in the future?**

After January 2, 2010, the statewide prohibitions on smoking identified above will remain in effect. In addition, smoking will be prohibited in (1) restaurants, (2) bars, and (3) lodging establishments that prepare and serve food and drink.

A "restaurant" is defined as a food or lodging establishment that prepares and serves food or drink and is regulated by the state's sanitation laws and regulations. This definition encompasses all restaurants that are inspected and permitted by local health departments and many of the lodging establishments across the state.<sup>24</sup> While it may seem a little awkward to include lodging establishments, such as hotels, motels, bed and breakfasts, and inns, within the definition of "restaurant," the sanitation laws enforced by state and local public health officials often group together all types of establishments that prepare or serve food or drink for human consumption.<sup>25</sup>

A "bar" is an establishment that holds a state permit authorizing it to sell malt beverages (e.g., beer), wine, or mixed drinks on its premises. Under this definition, several different types of venues could be considered bars, including restaurants, hotels, clubs, theaters and convention centers.

There are three exceptions to the prohibition on smoking in restaurants, lodging establishments and bars: (1) smoking guest rooms in lodging establishments, (2) cigar bars, and (3) private clubs.

- Up to 20% of the guest rooms in a lodging establishment may be designated as smoking guest rooms.

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20. North Carolina Department of Correction, Division of Prisons, Policies and Procedures, Ch. F, § .2500 (April 10, 2006).

21. See Department of Correction, Rules and Policies Governing the Management and Conduct of Inmates under the Control of the Division of Prisons (October 2007), available at <http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf> (last visited May 19, 2009).

22. See S.L. 2007-459 (amending G.S. §§ 131D-4.4; 131E-114.3, 122C-6, 131E-143).

23. Note that this prohibition does not apply to state psychiatric hospitals. Smoking is prohibited in those facilities pursuant to the general prohibition on smoking in state government buildings.

24. There are some types of food and lodging establishments that are exempt from the state sanitation laws and therefore would likely be exempt from the smoking prohibition. See G.S. 130A-250.

25. See, e.g., G.S. Chapter 130A, Article 8, Part 6 (Regulation of Food and Lodging Facilities).

- A cigar bar may allow smoking if smoke does not migrate into an enclosed area where smoking is otherwise prohibited under state law. A cigar bar is a bar that (1) generates at least 60% of its quarterly gross revenue from the sale of alcoholic beverages, (2) generates at least 25% of its quarterly gross revenue from the sale of cigars,<sup>26</sup> (3) has a humidor<sup>27</sup> on the premises, and (4) does not allow individuals under the age of 21 to enter the premises. Cigar bars seeking to fall within the exception must report revenue to the Department of Health and Human Services on a quarterly basis. If a cigar bar begins operation after July 1, 2009, it must be in a freestanding structure occupied only by the bar.
- A private club may allow smoking. A private club defined as a country club or an organization that (1) maintains selective members, (2) is operated by the membership, (3) does not provide food or lodging for pay to anyone who is not a member or a member's guest, and (4) is a nonprofit corporation.<sup>28</sup>

### *Administration*

To implement this new state law, the person who manages, operates or controls the restaurant or bar must take the following three steps: (1) conspicuously post no smoking signs, (2) remove all indoor ashtrays, and (3) direct a person who is smoking to extinguish the product.

### *Enforcement*

Enforcement will vary depending upon who is violating the law. If a smoker continues to smoke after being notified either orally or in writing to stop smoking by the person in charge of the facility, the smoker may be cited by a law enforcement official for an infraction. The punishment for such an infraction may only be a fine of not more than \$50. The smoker may not be assessed court costs.

If a person who manages, operates, or controls a restaurant, bar or lodging establishment fails to comply with the new law or with any rules adopted by the Commission for Public Health, the local health director has the authority to assess an administrative penalty, which is a monetary fine, of up to \$200. The fine may be assessed only after the person has been given written notice twice. The person may appeal the fine to the local board of health and ultimately through the court system.<sup>29</sup>

There are two other enforcement tools that are ordinarily available in the public health laws – a civil injunction<sup>30</sup> and a criminal misdemeanor.<sup>31</sup> The new law clearly states that no person may be charged with a misdemeanor for violating the prohibition on smoking in restaurants, bars or lodging establishments. It would be possible, however, to use an injunction as an enforcement tool. For example, if a person in charge of a restaurant refused to comply with the statewide law and simply chose to pay the \$200 fine every day, state or local public health officials could ask a court to issue an order directing the person's compliance. Failure to comply with the court order could then result in a finding of contempt by the judge.<sup>32</sup>

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26. Revenue generated from other tobacco sales, including cigarette vending machines, does not count toward the 25% minimum.

27. A humidor is a special box or room with constant humidity designed to store cigars or pipe tobacco.

28. The definition of private club is somewhat ambiguous. It is not clear whether a country club must satisfy the four criteria identified in the definition. In addition, the term "country club" is not defined. S.L. 2009-27 (amending G.S. 130A-492).

29. G.S. 130A-24.

30. G.S. 130A-18.

31. G.S. 130A-25.

32. See G.S. Chapter 5A, Article 2 (civil contempt).

## Local Government Authority

### Do local governments currently have the authority to regulate smoking within their jurisdictions?

Yes. Under current law, local governments<sup>33</sup> have limited authority to regulate smoking within their jurisdictions. They have the authority to adopt an ordinance, law, or rule restricting smoking in the following places:

- Buildings owned, leased as lessor, or the area leased as lessee and occupied by the local government;
- Buildings and grounds (up to 50 feet) of local health departments and departments of social services;
- Any place on a public transportation vehicle owned or leased by local government and used by the public; and
- Any place in a local vehicle, which is defined a passenger-carrying vehicle owned, leased, or otherwise controlled by local government and assigned permanently or temporarily to local government employees, agencies, institutions, or facilities for official local government business.<sup>34</sup>

### When the new law goes into effect, how will the authority of local governments change?

Effective January 2, 2010, local governments will have expanded authority to regulate smoking in public places. They will retain the authority to regulate smoking in local government buildings and local vehicles. They will have expanded authority to regulate smoking (1) on local government grounds and (2) in public places. A local law may not change the state law to allow smoking in restaurants, bars and lodging establishments where smoking is prohibited under the state law, but it could prohibit smoking in more places.

The expanded authority to regulate smoking on local government grounds is fairly straightforward. Local governments will have the authority to regulate all unenclosed areas owned, leased, or occupied by the local government. Previously, local governments were only allowed to regulate smoking on the grounds of buildings housing local health departments or departments of social services. With this change, for example, a city may be able to regulate smoking in the outdoor area surrounding city hall or a county may be able to prohibit smoking in a county-owned park.

The new authority to regulate smoking in public places is a bit more complex. The term “public place” is defined as an enclosed area to which the public is invited or in which the public is permitted. An area is “enclosed” if it has (1) a roof or other overhead covering of any kind and (2) walls or side coverings of any kind on all sides or all sides but one (regardless of openings available for entering and leaving the area). For example, a patio with a solid roof but no walls would be considered *unenclosed* but a patio that has a canvas roof and canvas walls on three of its four sides would be considered *enclosed*.

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33. A local government is “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.” G.S. 130A-498(c). Note that in the new law, this definition is moved to G.S. 130A-492(5).

34. G.S. 130A-498(b).

There are quite a few exceptions to the authority to regulate smoking in public places. A local government may *not* restrict or prohibit smoking in the following places:

- A private residence, which is a private dwelling that is not a child care facility or a long-term care facility.
- A private vehicle, which is a privately owned vehicle that is not used for commercial or employment purposes.
- A tobacco shop, but only if smoke from the business does not migrate into an enclosed area where smoking is otherwise prohibited under state law. A business will be considered a tobacco shop if (1) its main purpose is to sell tobacco, tobacco products, and accessories for such products, (2) it receives at least 75% of its revenue from such sales, and (3) it does not serve food or alcohol.
- All of the premises, facilities, and vehicles owned, operated or leased by any tobacco products processor or manufacturer, or any tobacco leaf grower, processor or dealer.
- A designated smoking guest room in a lodging establishment. Consistent with the state law, lodging establishments are allowed to designate up to 20% of the guest rooms as smoking rooms.
- A cigar bar, but only if smoke from the bar does not migrate into an enclosed area where smoking is otherwise prohibited under state law. A cigar bar is a bar that (1) generates at least 60% of its quarterly gross revenue from the sale of alcoholic beverages, (2) generates at least 25% of its quarterly gross revenue from the sale of cigars,<sup>35</sup> (3) has a humidor<sup>36</sup> on the premises, and (4) does not allow individuals under the age of 21 to enter the premises. The cigar bars must report revenue to the Department of Health and Human Services on a quarterly basis. If a cigar bar begins operation after July 1, 2009, it must be in a freestanding structure occupied only by the bar.
- A private club, which includes country clubs and any organization that (1) maintains selective members, (2) is operated by the membership, (3) does not provide food or lodging for pay to anyone who is not a member or a member's guest, and (4) is a nonprofit corporation.
- A motion picture, television, theater, or other live production set. This exemption applies only to the actor or performer portraying the use of tobacco products during the production.

While the list of exceptions to this new authority is quite long, there are still many opportunities for local regulation of smoking in public places. Some local governments have considered, for example, regulating or prohibiting smoking in enclosed shopping malls, bowling alleys and workplaces. While local governments previously lacked the authority to take action in this area, it is now possible that the debate around these types of policies can take place at the local level.

### **Which local government entities will be able to regulate smoking?**

The definition of local government is quite broad: "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

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35. Revenue generated from other tobacco sales, including cigarette vending machines, does not count toward the 25% minimum.

36. A humidor is a special box or room with constant humidity designed to store cigars or pipe tobacco.

such entity.”<sup>37</sup> Therefore, a variety of different local government entities will be able to take advantage of this new authority. For example,

- A board of county commissioners may adopt an ordinance that regulates smoking in the unincorporated areas of the county. County officials may also adopt a policy (which is not a law) that governs smoking in county-owned buildings located within municipalities.
- The governing board of a municipality (e.g., city council) may adopt an ordinance that regulates smoking within the municipality. The governing board also has the option of adopting a resolution agreeing to be governed by a county ordinance.<sup>38</sup>
- A local board of health may adopt a rule (which is a law) that regulates smoking throughout the entire county, including within all municipalities.<sup>39</sup> If a local board of health adopts a rule after the new state law goes into effect, the health rule will not be effective until the board of county commissioners adopts an ordinance approving the rule.<sup>40</sup>

While cities, counties and boards of health will probably be the primary local bodies taking action in this field, other local government entities, such as airport authorities, will also be able to regulate smoking within their jurisdictions.

### **Will more guidance on the new law be available?**

The changes made this year to the state’s smoking laws are fairly dramatic. It is likely that many questions related to interpretation and implementation of the law will arise over the next few years. Some of these questions may be answered when the Commission for Public Health issues implementing regulations in the coming months. In addition, the General Assembly could make some technical or clarifying changes to the law. As the need arises, the School of Government will post additional information and materials, such as frequently asked questions, online at [www.ncphlaw.unc.edu](http://www.ncphlaw.unc.edu).<sup>41</sup>

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37. S.L. 2009- 27. Section 1 (amending G.S. 130A-492 to incorporate the definition of local government used in G.S. Chapter 130A, Article 64).

38. G.S. 153A-122.

39. G.S. 130A-39(a). There are several variations on the public health service delivery model across the state. Most counties are served by a single county health department and a single county local board of health. Some counties are served by a multi-county district health department and a district board of health. One county is served by a public health authority and a public health authority board (Hertford). One county is served by a hospital authority and a hospital authority board (Cabarrus). One county is served by a human services agency and a human services board, charged with oversight of public health, social services and mental health (Wake). One county is served by a single-county health department but the board of county commissioners serves as the board of health (Mecklenburg). For more discussion of the state’s public health system, see Jill D. Moore, Public Health, Article 41 in *COUNTY AND MUNICIPAL GOVERNMENT* (David M. Lawrence, ed., 2007), available at <http://www.sog.unc.edu/pubs/cmg/cmg41.pdf>.

40. There is some ambiguity in the new law related to the board of health’s authority. S.L. 2009-27 (revising G.S. 130A-498) requires the board of county commissioners to adopt an ordinance approving any board of health rule adopted after July 1, 2009. However, the new law does not go into effect until January 2, 2010. Therefore, there is a window of time between July 1, 2009 and January 2, 2010 during which board of health rules related to smoking may or may not require approval from the board of county commissioners. The law is clear, though, that after January 2, 2010, all board of health rules related to smoking will require approval.

41. Other groups, such as the Tobacco Prevention and Control Branch at the N.C. Department of Health of Human Services and the North Carolina Alliance for Health (an advocacy organization) may also be disseminating guidance material. See, e.g., <http://www.tobaccopreventionandcontrol.ncdhhs.gov/> and <http://www.ncallianceforhealth.org/> (last visited May 21, 2009).

## Appendix

### Key Definitions

**Bar:** An establishment with a state permit to sell malt beverages (e.g., beer) or wine (fortified or unfortified). Definition can encompass a variety of venues such as theaters, hotels and convention centers.

**Cigar bar:** A bar (see definition above) that (1) generates at least 60% of its quarterly gross revenue from the sale of alcoholic beverages, (2) generates at least 25% of its quarterly gross revenue from the sale of cigars,<sup>42</sup> (3) has a humidor on the premises, and (4) does not allow individuals under the age of 21 to enter the premises.

**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 entry or exit.

**Local government:** A local political subdivision of the state, an airport authority, or an authority or body created by an ordinance, joint resolution, or rules of any such entity.

**Lodging establishment:** An establishment that provides lodging for pay to the public.

**Private club:** (1) A country club or (2) 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 under state law or is tax-exempt under federal law.

**Public place:** An enclosed area to which the public is invited or in which the public is permitted.

**Restaurant:** A food and lodging establishment that prepares and serves drink or food as regulated by state's sanitation laws.

**Smoking:** The use or possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product.

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42. Revenue generated from other tobacco sales, including cigarette vending machines, does not count toward the 25% minimum.

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