

Update on Smoke-free Restaurants and Bars Law Rules



**ANNUAL NC HEALTH DIRECTORS LEGAL
CONFERENCE**

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DIVISION OF PUBLIC HEALTH

H74: 2013



SMOKING BAN RULES

SECTION 23. No later than **January 1, 2014**, the **Commission for Public Health** shall **amend and clarify its rules** adopted pursuant to G.S. 130A-497 for the implementation of the prohibition on smoking in restaurants and bars. **The rules shall ensure the consistent interpretation and enforcement** of Part 1C of Article 23 of Chapter 130A of the General Statutes and shall **specifically clarify the definition of enclosed areas** for purposes of implementation of the Part. Rules adopted pursuant to this section (i) shall be exempt from the requirements of G.S. 150B-21.4, (ii) are not subject to Part 3 of Article 2A of Chapter 150B of the General Statutes, and (iii) shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2). No later than November 1, 2013, the Commission shall report to the Joint Legislative Oversight Committee on Health and Human Services on its progress in amending and clarifying the rules.

“Enclosed” as defined by the Current Law



- **S.L. 2009-27 *Prohibit Smoking in Certain Public Places*** prohibits smoking in **enclosed areas** of restaurants and bars. G.S.130A-492 defines “enclosed area” as “*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*”.

The Surgeon General on Secondhand Smoke



- Secondhand smoke exposure causes disease and premature death in children and adults who do not smoke.
- Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma. Smoking by parents causes respiratory symptoms and slows lung growth in their children.
- Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer.
 - Breathing secondhand smoke for even a short time can have immediate adverse effects on the cardiovascular system and interferes with the normal functioning of the heart, blood, and vascular systems in ways that increase the risk of a heart attack.
 - Nonsmokers who are exposed to secondhand smoke at home or at work increase their risk of developing heart disease by 25 - 30 percent.
 - Nonsmokers who are exposed to secondhand smoke at home or at work increase their risk of developing lung cancer by 20 - 30 percent.
- The scientific evidence indicates that there is **no risk-free level of exposure** to secondhand smoke.

Opportunity to Clarify



- **Battleground Restaurant Group, Inc., d/b/a Kickback Jack's** appealed administrative penalties to the New Hanover County Board of Health in 2012. It contended that the smoking area in Kickback Jack's was not an "enclosed area" within the meaning of NC G.S. §130A-492(5) and §130A-496 due to the presence of windows and a door opening.
- The Board of Health heard the appeal on June 6, 2012 and rendered a decision upholding the penalties on June 19, 2012. Kickback Jack's filed notice of appeal to the New Hanover County District Court. The case was heard and upheld by the District Court in September 2012.
- This is an opportunity to clarify questions that restaurants, bars and the public may have about what clearly defines an unenclosed area.











Process - Steps Taken



- Convened expert team to draft rule. This included experts from the UNC School of Government; NC Attorney General's office, public health professionals.
- Sought input from:
 - NC Restaurant and Lodging Association
 - NC Association of Local Health Directors
 - Office of the State Fire Marshall on building codes in NC
 - NC Alliance for Health
 - Battleground Restaurants Group

Timeline: S.L. 2013-413 Section 23

Clarify the Definition of Enclosed Areas for NC Smoke-free Restaurant and Bars Law



Certified by the Office of State Budget and Management	September 18, 2013
Proposed Rule was Posted by the Office of Administrative Hearings for Public Comment Written comments were sent to: Chris G. Hoke, JD 1931 Mail Service Center Raleigh, NC 27699-1931	October 1, 2013
Public Hearing	October 23, 2013
Updated the Commission for Public Health	October 25, 2013
The Commission reported to the Joint Legislative Oversight Committee on Health and Human Services on its progress in amending and clarifying the rules.	November 1, 2013
Comment Period ended	December 2, 2013
Commission for Public Health Meeting	December 4, 2013
Approval by the NC General Assembly	Session begins May 14, 2014

***PROPOSED RULE AS POSTED* CHAPTER 39 – ADULT HEALTH**

SUBCHAPTER 39C – SMOKING PROHIBITED IN RESTAURANTS AND BARS

SECTION .0100 – GENERAL

10A NCAC 39C .0104 CLARIFICATION OF THE DEFINITION OF ENCLOSED AREA

- (a) An area is enclosed if it has
 - (1) a roof or other overhead covering and
 - (2) permanent or temporary walls or side coverings on three or more sides that make up 55 percent or more of the total combined perimeter surface area.
- (b) A roof, overhead covering, wall or side covering includes any permanent or temporary physical barrier or retractable divider. Examples of materials for a roof, overhead covering, wall or side covering include wood, metal, canvas, tarp, cloth, glass, tent material, plastic, vinyl sheeting, fabric shades, lattice, awning material, polyurethane sheeting or any other similar material. Walls or side coverings do not include mesh screening which is 0.011 gauge with an 18 by 16 mesh count or more open mesh size.
- (c) An opening means a door, a window or any other aperture that is open to the outdoors.
- (d) If the openings in an unenclosed area are covered, such that the area at that time meets the definition of being enclosed pursuant to Paragraph (a), then smoking must be prohibited in the area while the openings are so covered.
- (e) If windows or doors form any part of the partition between an enclosed area and an unenclosed area that is used for smoking, these openings shall be closed at all times during the operation of the establishment except for ingress and egress to prevent migration of smoke into the enclosed area.
- (f) Nothing in this Rule prohibits a restaurant or bar owner from making an unenclosed area smoke-free.

Authority G.S. 130A-497.

Public Hearing October 23, 2013



Spoke in Favor of the Proposed Rules as posted	Spoke in favor of changing the Proposed Rules
NC Restaurant and Lodging Association	Battleground Restaurant Group
American Heart Association/American Stroke Association Mid Atlantic Affiliate	
NC Alliance for Health, representing 26 organizations to-date. See below*	
American Cancer Society Cancer Action Network	
NC Association of Local Health Directors	

*American Cancer Society Cancer Action Network; American Heart Association; American Lung Association of NC; Americans for Non-smokers Rights; Asheville High School Teens Against Tobacco Use Club; Campaign for Tobacco Free Kids; Cone Health Foundation; Covenant for North Carolina's Children; Forsyth County Infant Mortality Reduction Coalition; Hyde County Health Department; Lung Cancer Initiative of NC; March of Dimes NC Chapter; NC Citizens for Public Health; NC Council of Churches; NC Pediatric Society; NC Prevention Partners; NC State Alliance of YMCA's; NC League of Conservation Voters; NC Public Health Association; Scotland County Department of Health; Smoke Free Guilford; Smoke Free Mecklenburg; Vidant Medical Center Pediatric Asthma Center; YMCA of the Triangle: Youth Empowered Solutions; plus several individuals - legislators, former legislators/bill sponsors; former health officials.

Total Public Comments



	Supportive	Opposed
Individuals	13	0
Organizations	62	1
Total	75	1

Legislative Intent



- Letter signed by six current and former state legislators who supported the passage of NC's Smoke-Free Restaurants and Bars Law
- Expresses support for the adoption of the rule clarification of the definition of “enclosed area” as proposed by DPH

*The legislative intent behind HB2, Prohibit Smoking in Certain Public Places, was to prohibit smoking indoors, or in “enclosed” areas of restaurants and bars, as a means to **protect workers and customers alike from the proven dangers of secondhand smoke**...by defining “enclosed area” as the law did, it was our intent to **allow business owners some flexibility** to permit smoking in settings that were truly outdoor, or unenclosed.*

Quote from Public Comments



“...I recall visiting restaurants as I was bearing child in 2008 and wondering what harm my unborn child was being exposed to as I performed my job.”

(After the law went into effect) I had the privilege of inspecting restaurants without this unnecessary worry...”

-Registered Environmental Health Specialist

Negotiations with Battleground Restaurant Group



- Interest is to ensure the consistent interpretation and enforcement statewide.
- DPH drafted guidance to help ensure consistent interpretation and enforcement statewide.
- Some aspects of guidance were then added to the proposed rules at Battleground Restaurant Group's request.
- Revised Proposed Rule resolved their concerns.

Commission for Public Health Adopted Rule

December 4, 2013

10A NCAC 39C .0104 CLARIFICATION OF THE DEFINITION OF ENCLOSED AREA

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- (e) If windows or doors form any part of the partition between an enclosed area and an unenclosed area that is used for smoking, these openings shall be closed at all times during the operation of the establishment except for ingress and egress to prevent migration of smoke into the enclosed area.
- (f) Nothing in this Rule prohibits a restaurant or bar owner from making an unenclosed area smoke-free.
- (g) Local health department environmental health staff shall assess compliance with this rule during the next required inspection following the effective date of this rule and subsequently as necessary.
- (h) Required plan review for new restaurants and restaurants undergoing a change in ownership shall include review for compliance with this rule.

Authority G.S. 130A-497.

Commission for Public Health Adopts New Rules at December 4, 2013 Meeting.



	Supportive	Opposed
Individuals	13	0
Organizations	63	0
Total	76	0

*Final approval by NC General Assembly when they convene May 14, 2014.
They have 30 days to take up the rule; if not, it goes into effect at that time.*

How to Calculate Whether an Area is Enclosed based on the Commission for Public Health Adopted Rules



(a) An area is enclosed if it has

- (1) a roof or other overhead covering and
- (2) permanent or temporary walls or side coverings on **three or more sides** that make up **55 percent** or more of the **total combined perimeter surface area**.

Step 1

- Measure the **WIDTH** and **HEIGHT** of each wall or side forming the perimeter of the area under consideration. (Use only vertical sides; roof and floor are not included.)

Step 2

- Multiply the **WIDTH** times the **HEIGHT** of each wall or side to determine the **Square Footage** of each wall or side.

Step 3

- Add the **Square Footage** of each wall or side to find the **Total Combined Perimeter Surface Area**.

Step 4

- Measure the **WIDTH** and **HEIGHT** of the openings to the outdoors in each wall or side.

Step 5

- Multiply the **WIDTH** times the **HEIGHT** of each opening to the outdoors in the walls or sides to determine the **Square Footage** of each opening(s).

Step 6

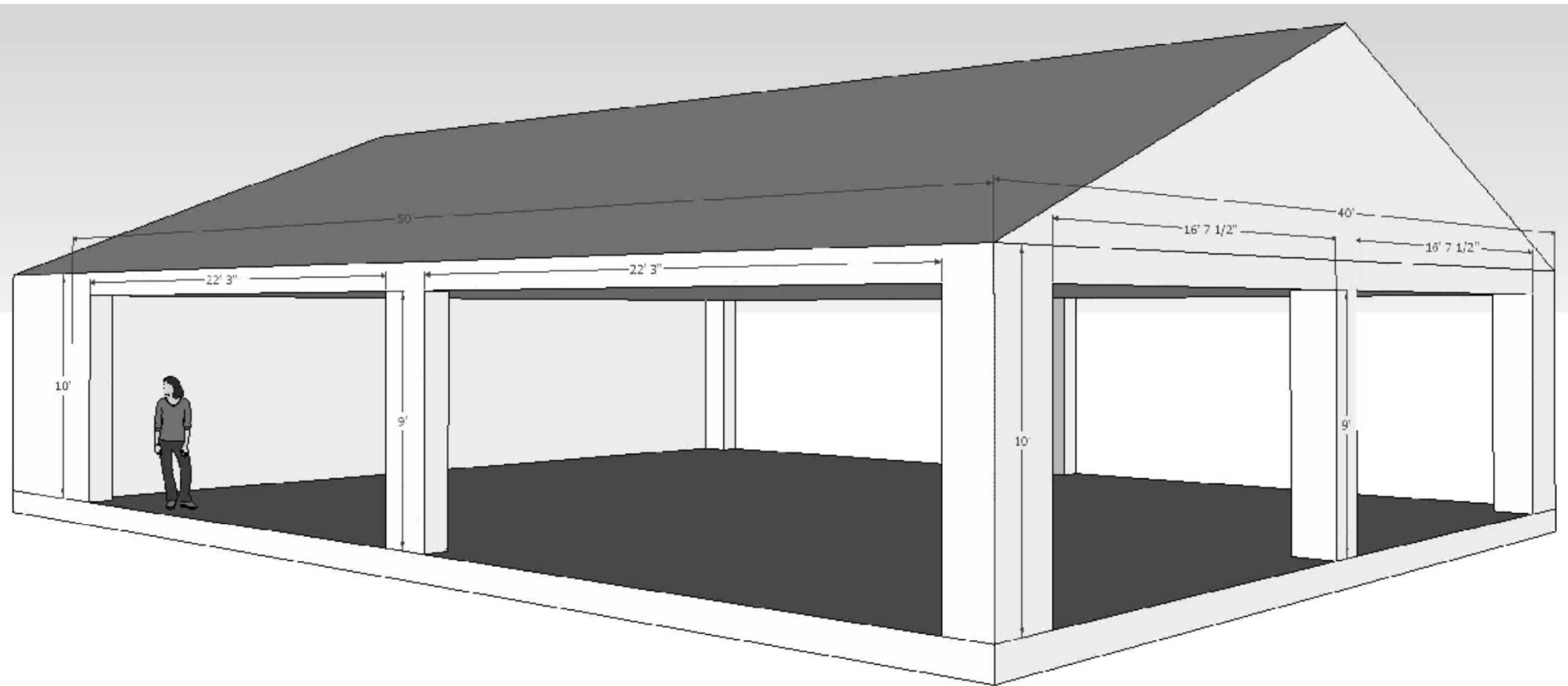
- Add the **Square Footage** of each opening to the outdoors in the walls or sides to find the **Open Surface Area**.

Step 7

- Divide the **Open Surface Area** by the **Total Combined Perimeter Surface Area** to determine the percentage of the walls or sides that is open to the outdoors.

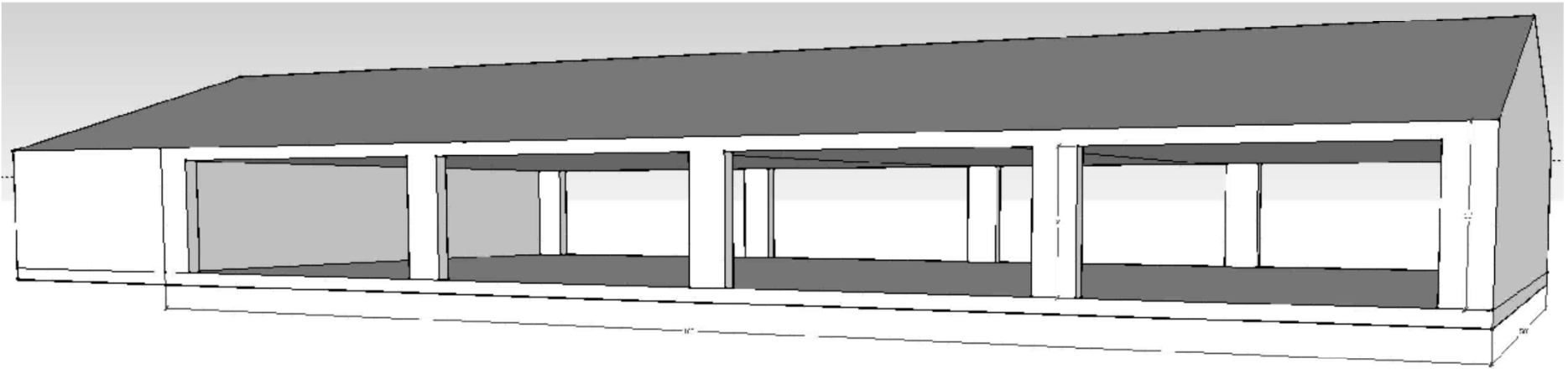
Example 1: Unenclosed

Example 1---**39%** of the Total Combined Perimeter Surface Area of the four walls is enclosed
(**<55 percent**)



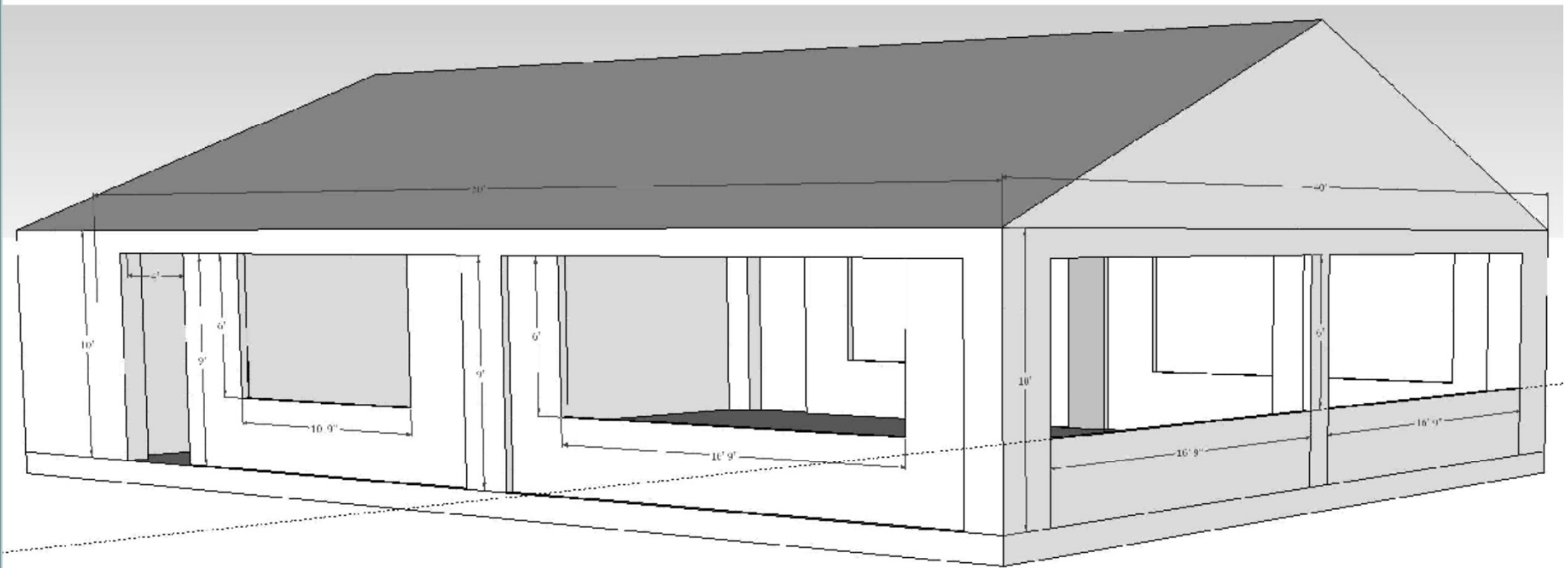
Example 2: Unenclosed

Example 2---**40%** of the Total Combined Perimeter Surface Area of the four walls is enclosed (**<55 percent**)



Example 3: Enclosed

Example 3---**60%** of the Total Combined Perimeter Surface Area of the four sides is enclosed
(**>55 percent**)



Next Steps in the Legislative Process



- The legislative process is a “disapproval” process (opportunity), not an “approval” process of the rule.
- The Rule becomes effective on the 31st legislative day from the beginning of the session if a bill is NOT INTRODUCED that specifically disapproves the rule in the first 30 legislative days of the session.
- If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the 31st legislative day of that session, the rule becomes effective on the earlier of either:
 - the day an unfavorable final action is taken on the bill or
 - the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule.
- A permanent rule that is specifically disapproved by a bill ratified by the General Assembly does not become effective.

Ensuring Consistent Interpretation and Compliance



- Advisory Team will assist with approval of information and training plans.
- A letter will go out to all restaurants and bars.
- Educational material about the new rule will be provided to the NC Restaurant and Lodging Association for distribution to members.
- NC Division of Public Health will work with the NC Association of Local Health Directors to conduct webinar(s) on the new rule.
- NC Division of Public Health will post guidance documents and archived webinar(s) about the rule at www.smokefree.nc.gov.
- Each restaurant that has an “unenclosed area” where smoking is allowed will be assessed by the Local Health Department Environmental Health Staff.

Questions? Thank you!



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