

SMOKE-FREE RESTURANTS AND BARS LAW LEGAL AND LEGISLATIVE UPDATE

4/20/11

Guilford County Appeal

1. Gate City Appealed 2 administrative fines to the Board of Health that were issued by the Guilford County Health Director.
 - a. The Board of Health upheld both penalties.
2. Gate City appealed this decision to the District Court (per N.C. Gen. Stat. § 130A-34).
 - a. During this proceeding, Gate City argued that the private club exception¹ in NC's Smoke-Free Restaurants and Bars law ("the Smoke-Free Law") violated its **Equal Protection** Rights under both the 14th Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution.
 - b. Specifically they argued that because non-profit private clubs are similarly situated to for-profit private clubs, this exemption (which exempts non-profit private clubs and not for-profit private clubs) does not provide it equal protection under the law. They contended that there is no rational basis between this exemption and the State's stated purpose behind the Smoke-Free Law of "protecting the health of individuals in public places and places of employment and riding in State government vehicles from the risks related to secondhand smoke."
 - c. Gate City only brought an "as applied" challenge.
3. The District Court, through Judge Samet, held that there is a rational basis for the exemption and, therefore, the Smoke-Free Law does not violate Gate City's Equal Protection Rights.
4. Gate City Appealed to the North Carolina Court of Appeals. The case was heard in the Court of Appeals on February 8, 2011, and the parties are currently awaiting a decision.

Pitt County Appeal

1. Live, Club 519, 5th Street Distillery, and Mac Billiards were all fined by the Pitt County Health Director for violating the Smoke-Free Law and all 4 appealed to the Board of Health.
 - a. The fines were upheld by the Board of Health
2. The 4 bars appealed this decision to the District Court (per N.C. Gen. Stat. §130A-34).
 - a. They argued that the private club exemption contained in the Smoke-Free Law violated their **Equal Protection** Rights under both the 14th Amendment of the U.S. Constitution and Article I, Section 19 of the NC Constitution.
 - i. They first argued that exempting all country clubs while not exempting for-profit private clubs was irrational and therefore violated their Equal Protection Rights.
 - ii. They next argued that exempting non-profit private clubs while not exempting for-profit private clubs was irrational and, therefore, violated their Equal Protection Rights.
 - b. They also argued that because Pitt County imposed fines daily until the bars notified the Health Department that they were in compliance, their Procedural Due Process rights were violated.
3. On November 17, 2010, District Court Judge G. Galen Braddy issued an Order and Memorandum of Order holding the private club exemption unconstitutional as applied to the 4 bars. He further ordered that all fines previously issued against the bars be set aside. The decision rendered by the District Court reasoned that country clubs and the 4 bars are similarly situated, and there is no rational basis for exempting country clubs while not exempting the 4 bars from the Smoke-Free Law. Thus, the court agreed with the 4 bars' argument that the private club exemption was unconstitutional as applied to their establishments.

¹ The private club exemption at issue in the Smoke-Free Law reads as follows: "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."

4. On November 22, 2010, the Pitt County Health Department filed a notice of Appeal to the North Carolina Court of Appeals. Due to the decision of the Pitt County Commissioners to withdraw county representation for this appeal, Pitt County Attorney Lisa Overton withdrew from the case on January 7, 2011. Attorney Adam Stein agreed to offer his services to the Pitt County Board of Health pro bono, and on February 11, 2011, he filed a Notice of Appearance.
5. The appeal is progressing and should be docketed in the Court of Appeals within the next few weeks.

SB469

This bill adds a provision to the Smoke-Free Law that would exempt from the requirements of the law restaurants and bars that only allow those who are age 18 or older into their establishment. The bar or restaurant must require identification from every person who tries to enter the establishment to verify that they are at least 18 years old. The bill states that if a restaurant or bar institutes these age restrictions, they may allow smoking if their establishment is “structurally separated” and is ventilated such that smoke is prevented from migrating into an area where smoking is prohibited under the Smoke-Free Law. For an establishment to be “structurally separated,” the area where smoking is allowed must be “physically separated” from other areas by a stud wall that extends from the floor to the ceiling. This wall, however, may have portions that are made of glass as long as there is no migration of smoke into an area that is prohibited by the Smoke-Free Law from allowing smoking. Local Health Directors would still be charged with enforcement of the law.

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