

STATE OF NORTH CAROLINA
COUNTY OF PITT

FILED

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 10 CVD 1231

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PITT COUNTY, N.C.

**BENJAMIN EDWARDS and
LYNN OWENS, OWNERS
OF "LIVE"; GEORGE BEAMAN,
OWNER OF "CLUB 519", "5TH
STREET DISTILLERY" AND
"MAC BILLIARDS"**

Petitioners,

v.

**PITT COUNTY HEALTH
DIRECTOR,
DR. JOHN H. MORROW**

Respondent.

**RESPONDENT'S ANSWER TO
PETITION FOR JUDICIAL REVIEW**

N.C. Gen. Stat. §130A-24 et. seq.

MOTION TO STRIKE

N.C. Gen.Stat. §1A-1, Rule 12(f)

MOTION FOR TEMPORARY INJUNCTION

N.C.Gen.Stat. §1A-1, Rule 65

COMES NOW Respondent Dr. John H. Morrow, the Pitt County Health Director, by and through his undersigned counsel, hereby answering the Petition for Judicial Review by stating as follows:

ANSWER

1. The allegations contained in Paragraph 1 of the Petition are admitted in part and denied in part. It is admitted that the Petitioners, upon information and belief, are citizens and residents of Pitt County, North Carolina. However, the Respondent, Pitt County Health Director Dr. John H. Morrow, is without sufficient information to admit or deny the remaining allegations contained in Paragraph 1 of the Petition and to the extent that any response is needed, the remaining allegations contained in Paragraph 1 are denied.

2. The allegations contained in Paragraph 2 of the Petition are admitted in part and denied in part. It is admitted that "Live", "Club 519", "5th Street Distillery" and "Mac Billiards", are, upon information and belief, North Carolina Corporations and that their primary place of business is Pitt County, North Carolina. However, the Respondent, Pitt County Health Director Dr. John H. Morrow, is without sufficient information to admit or deny the remaining allegations contained in Paragraph 2 of the Petition and to the extent that any response is needed, the remaining allegations contained in Paragraph 2 are denied.

3. The allegations contained in Paragraph 3 of the Petition are admitted.

4. The allegations contained in Paragraph 4 of the Petition are admitted.
5. The allegations contained in Paragraph 5 of the Petition are admitted.
6. The allegations contained in Paragraph 6 of the Petition are admitted.
7. The allegations contained in Paragraph 7 of the Petition are admitted.
8. The allegations contained in Paragraph 8 of the Petition are admitted in part and denied in part. It is admitted that the Pitt County Board of Health ruled unanimously to uphold the fines and that the Health Director advised Petitioners that fines would continue daily until the establishments were brought into compliance with N. C. Gen. Stat. §130A-496. The remaining allegations contained in Paragraph 8 of the Petition are denied.
9. The allegations contained in Paragraph 9 of the Petition are admitted.
10. The allegations contained in Paragraph 10 subsection "a" of the Petition are denied. Petitioners have not alleged with specificity any act that suggests a failure to provide due process under the law.

The allegations contained in Paragraph 10 subsection "b" of the Petition are denied. The 6th Amendment of the United States Constitution, also known as the confrontation clause, applies only to criminal due process of law and protects the right of cross-examination guaranteed to persons accused of a crime. Because the confrontation clause does not apply in this administrative context, Petitioners have incorrectly asserted that the Pitt County Board of Health's decision was made upon unlawful procedure.

The allegations contained in Paragraph 10 subsection "c" of the Petition are denied. The North Carolina General Assembly specifically considered an amendment to include private clubs as defined under N. C. Gen. Stat. §18B-1001 and the proposed amendment failed. See Respondent's Exhibit "A", attached and incorporated herein. The North Carolina General Assembly also specifically considered an amendment that would require a local health director to directly observe a violation in order to impose an administrative penalty and that proposed amendment also failed. See Respondent's Exhibit "B", attached and incorporated herein.

The allegations contained in Paragraph 10 subsection "d" of the Petition are denied. Petitioners again erroneously assert the application of the confrontation clause, which does not apply in this administrative context.

The allegations contained in Paragraph 10 subsection "e" of the Petition are not plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims. However, to the extent that a response is needed, any allegations contained in Paragraph 10 subsection "e" of the Petition are denied.

11. The allegations contained in Paragraph 11 subsections "a" through "u" of the Petition are

not plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims. However, to the extent that a response is needed, any allegations contained in Paragraph 11 subsections "a" through "u" of the Petition are denied:

12. The allegations contained in Paragraph 12 of the Petition are denied. Petitioners have failed to plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims.

13. The allegations contained in Paragraph 13 of the Petition are denied. Petitioners have failed to plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims.

14. The allegations contained in Paragraph 14 of the Petition are denied. Petitioners have failed to plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims.

15. The allegations contained in Paragraph 15 of the Petition are denied. Petitioners have failed to plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims.

16. The allegations contained in Paragraph 16 of the Petition are denied. Petitioners have failed to plead with sufficient specificity as to put the Respondent on notice regarding any of Petitioners claims.

17. The allegations contained in Paragraph 17 of the Petition are denied. Petitioners have failed to demonstrate with specificity evidence of any error of law or evidence of unlawful procedure. The Petitioners have failed to meet their burden of proving the unconstitutionality of the Act to Prohibit Smoking in Certain Public Places and Places of Employment and have failed to provide any contrary evidence to the Pitt County Health Director's assertions that their establishments have operated in violation of the law. Further, Petitioners have failed to articulate with specificity any arbitrary or capricious decision made by the Pitt County Board of Health.

18. The Respondent incorporates by reference the responsive pleadings contained in Paragraphs 1 through 17 of Respondent's Answer to Petition for Judicial Review as if fully set forth herein.

19. The allegations contained in Paragraph 19 of the Petition are admitted in part and denied in part. It is admitted that North Carolina courts have long held that the General Assembly may create classes and classify objects of legislation. It is further alleged that the General Assembly exactly created this sort of classification in its enactment of the Act to Prohibit Smoking in Certain Public Places and Places of Employment. It is denied that Petitioners are likely to succeed on the merits of the claims set forth in the Petition for the reason that the North Carolina General Assembly actually contemplated a proposed amendment to the Act to Prohibit Smoking in Certain Public Places and Places of Employment that would include private clubs as defined under N. C. Gen. Stat. §18B-1001 and that proposed amendment failed. Again, see Respondent's Exhibit "A", attached and incorporated herein.

20. The allegations contained in Paragraph 20 of the Petition are denied. Petitioners are readily able to mitigate any actual and immediate substantial financial harm by discontinuing smoking in enclosed areas of their respective establishments. Numerous offers have been made by the Pitt County Health Department to stay the imposition of penalties against Petitioners provided that smoking is also temporarily stayed pending the outcome of Petitioners' appeal. Additionally, smoking is only prohibited in enclosed areas, so Petitioners may also direct customers to smoke in any outdoor unenclosed area such as a patio, sidewalk or the like.

21. The allegations contained in Paragraph 21 of the Petition are denied. Respondent's interest in enforcing the Act to Prohibit Smoking in Certain Public Places and Places of Employment is to protect the public health from the harms associated with second hand smoke. This harm will continue as long as Petitioners continue to operate their businesses in violation of the law.

MOTION TO STRIKE
N.C.Gen.Stat. §1A-1, Rule 12(f)

22. The responsive pleadings contained in Paragraphs 1 through 21 above are incorporated by reference as if fully set forth herein.

23. The standard for review of an administrative decision is delineated in the Administrative Procedure Act, found in Article 4, Chapter 150B of the North Carolina General Statutes. In this instance, N.C. Gen. Stat. §150B-51 requires that the *de novo* review of the local health director's imposition of administrative penalties occur based on the official record.

24. Petitioners, through the attachment of various documents to the Petition for Judicial Review and through the issuance of subpoenas for testimony of witnesses, now seek to introduce new evidence into the record before this court. N.C. Gen. Stat. §150B-49 specifically prohibits new evidence on judicial review and requires that a case be remanded to the administrative agency that issued the contested decision if the court determines that new evidence needs to be considered.

25. Petitioners failed to submit any evidence at the initial appeals hearing before the Pitt County Board of Health on April 26, 2010 and have not alleged facts sufficient to satisfy this court that evidence could not have reasonably been presented at the administrative hearing before the Board of Health.

COUNTERCLAIM
MOTION FOR INJUNCTION
N.C.Gen.Stat. §1A-1, Rule 65

26. The Respondent adopts and incorporates herein by reference the responsive and affirmative allegations set forth in Paragraphs 1 through 25 above.

27. The Respondent, Pitt County Health Director Dr. John H. Morrow, is authorized by the

State of North Carolina to ensure the health and wellbeing of the citizens of Pitt County under the provisions of Chapter 130A of the North Carolina General Statutes.

28. The Act to Prohibit Smoking in Certain Public Places and Places of Employment went into effect as law on January 2, 2010 and prohibits smoking in enclosed areas of certain bars and restaurants.

29. Following attempts to educate Petitioners on the requirements of the new law, first, second and third violations of the Act to Prohibit Smoking in Certain Public Places and Places of Employment were issued and administrative penalties of \$200.00 per day were imposed upon the Petitioners.

30. At the appeals hearing before the Pitt County Board of Health, the Petitioners did not testify, did not submit any evidence, and did not call any witnesses to provide testimony to contradict the evidence submitted by the Pitt County Health Director regarding their violations of the law.

31. Upon information and belief, the Petitioners Benjamin Edwards and Lynn Owens, owners of Live and George Beaman, owner of Club 519, 5th Street Distillery and MacBilliards, continue to operate their business establishments in violation of the law and have failed to comply with N. C. Gen. Stat. §130A-496.

32. The Defendants' violations subject them to the injunctive relief provisions of N. C. Gen. Stat. §130A-18, and the Pitt County Health Director is entitled to equitable relief to prevent, restrain, correct or abate the violations noted above.

33. The continuing violation of N. C. Gen. Stat. §130A-496 presents a public health hazard and a nuisance. This condition is one which the Petitioners should not be permitted to inflict and the Plaintiff should not be required to endure, and is of such a continuous and frequent occurrence as to cause immediate harm and irreparable injury to the public health.

34. Respondent is without adequate remedy at law as to these violations as Petitioners have ignored the requests of the Pitt County Health Department that they prohibit smoking in their business establishments. Respondent, as the authorized agent to ensure the public health of Pitt County citizens, is suffering immediate, irreparable injury in that the public is exposed to an ongoing health hazard based upon the Petitioners' violations of N. C. Gen. Stat. §130A-496.

WHEREFORE, Respondent prays the Court as follows:

1. That the Petitioners be denied the relief sought in the Petition for Judicial Review in its entirety.
2. That the Court disallow the submission of new evidence on review in accordance with N. C. Gen. Stat. §150B-49.
3. That the Court strike from evidence the evidentiary documents accompanying

Petitioners' Petition for Judicial Review that were not made a part of the underlying record.

4. That the Court grant a Restraining Order, immediately restraining the Petitioners from continuing to allow smoking in the enclosed areas of their business establishments in violation of N.C. Gen. Stat. §130A-496.

5. That the Court further order the Petitioners to immediately comply with N.C. Gen. Stat. §130A-497 by requiring the Petitioners to take the following actions:

- a. Conspicuously post signs clearly stating that smoking is prohibited;
- b. Remove any ashtrays or similar tobacco ash receptacles from inside the business establishment; and
- c. Direct all persons smoking to extinguish any cigarette, cigar or other lighted tobacco product.

6. For such other and further relief as the Court may deem just and proper.

This the 10th day of June, 2010.

PITT COUNTY LEGAL DEPARTMENT

By: *Lisa Woodard Overton*
Lisa Woodard Overton
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **RESPONDENT'S ANSWER TO PETITION FOR JUDICIAL REVIEW, MOTION TO STRIKE** and **MOTION FOR TEMPORARY INJUNCTION** in the above titled action upon all other parties by depositing a copy hereof via first class postage prepaid, in the United States mail, properly addressed to:

Jonathan V. Bridgers
Owens, Nelson, Owens & Dupree, P.L.L.C.
Post Office Box 36
Greenville, NC 27835

This the 10th day of June, 2010.

PITT COUNTY LEGAL DEPARTMENT

BY: *Lisa Woodard Overton*
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