

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

10-13-3 PM 3:35
PITT COUNTY C.S.C.

10-CVS- 2199

PITT COUNTY HEALTH DIRECTOR,

Dr. John H. Morrow,
Plaintif,

vs.

BENJAMIN EDWARDS and
LYNN EVANS, Owners of LIVE
Defendants.

**VERIFIED COMPLAINT
AND MOTION FOR
INJUNCTIVE RELIEF**

N.C. Gen. Stat. §130A-18
N.C. Gen. Stat. §1A-1, Rule 65

COMES NOW the Plaintiff, Pitt County Health Director Dr. John H. Morrow, pursuant to N.C. Gen. Stat. §130A-18 and N.C. Gen. Stat. §1A-1, Rule 65, complaining of the Defendants and hereby moving this Honorable Court for injunctive relief by alleging and saying the following:

1. That the Plaintiff, 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, through directing the efforts of the Pitt County Health Department under the provisions of Chapter 130A of the North Carolina General Statutes.
2. That the Plaintiff, Pitt County Health Director Dr. John H. Morrow, manages the Pitt County Public Health Center, a local health department operating in Pitt County, North Carolina.
3. That the Defendants, Benjamin Edwards and Lynn Evans are the owners of the Live nightclub located at 2120 East Fire Tower Road in Greenville, Pitt County, North Carolina, 27858.

4. That N.C. Gen. Stat. §130A-496, et. seq., also known as the Act to Prohibit Smoking in Certain Public Places and Places of Employment, went into effect as law on January 2, 2010. Under this new law, smoking is prohibited in enclosed areas of bars and restaurants.

5. That N.C. Gen. Stat. §130A-497 requires bar owners and managers to take the following steps:

- a. Conspicuously post signs clearly stating that smoking is prohibited;
- b. Remove all indoor ashtrays and other smoking receptacles; and
- c. Direct a person who is smoking to extinguish the lighted tobacco product.

6. That pursuant to N.C. Gen. Stat. §130A-22(h1), the local health director is authorized to enforce the provisions of N.C. Gen. Stat. §130A-497 through the imposition of administrative penalties.

7. That notwithstanding the enforcement remedies available in N.C. Gen. Stat. §130A-22(h1), the local health director is also authorized to seek injunctive relief pursuant to N.C. Gen. Stat. §130A-18 for violation of any public health law.

8. That complaints were received on January 24, 2010, February 14, 2010, February 21, 2010, February 28, 2010 and March 7, 2010 that Live was violating the smoking prohibition law and alleging that 1) employees and/or customers were observed smoking inside; 2) required "No Smoking" signs were not visible at each public entrance; 3) ashtrays or similar tobacco ash receptacles were present and that 4) the person in charge of the establishment had knowledge that someone was smoking in the establishment in violation of the law and did not direct the person to extinguish the cigarette, cigar or other item.

9. That on February 11, 2010, a representative of the Pitt County Health Department conducted an unannounced on-site inspection at the Live and noncompliance with the law was verified. Subsequently, on February 15, 2010, a "First Violation" letter was issued. A copy of this "First Violation" letter is attached hereto as Exhibit A and is incorporated herein by reference.

10. That on February 24, 2010, a representative of the Pitt County Health Department made another on-site inspection at the Live and noncompliance with the law was again verified. Subsequently on February 25, 2010, a "Second Violation" letter was issued. A copy of this "Second Violation" letter is attached hereto as Exhibit B and is incorporated herein by reference.

11. That on March 9, 2010, a representative of the Pitt County Health Department made a third on-site visit and verified continued noncompliance with the law. Subsequently on March 10, 2010, a "Third Violation" letter was issued and an ongoing administrative penalty of \$200.00 per day was imposed upon the owners of Live night club pursuant to N.C. Gen. Stat. §130A-22(h1). A copy of this "Third Violation" letter is attached hereto as Exhibit C and is incorporated herein by reference.

12. That the "Third Violation" letter issued to Live advised the owners, Benjamin Edwards and Lynn Owens, that this administrative penalty would continue to accrue at a rate of \$200.00 per day until 1) the owners provided notice to the Pitt County Health Department that the violation(s) had been corrected; 2) the owners provided the Pitt County Health Department staff access to the Live during the establishment's operating hours; and 3) the health department staff certified that the Live was in compliance with the law. This letter also detailed the process to appeal the administrative penalty pursuant to N.C. Gen. Stat. §130A-24.

13. That additional complaints were received on March 14, 2010, April 4, 2010, April 18, 2010 and May 9, 2010 that Live was violating the smoking prohibition law and alleging that 1) employees and/or customers were observed smoking inside; 2) required "No Smoking" signs were not visible at each public entrance; 3) ashtrays or similar tobacco ash receptacles were present and that 4) the person in charge of the establishment had knowledge that someone was smoking in the establishment in violation of the law and did not direct the person to extinguish the cigarette, cigar or other item.

14. That on June 21, 2010 at 3:19 p.m. a voicemail message was delivered to a representative of the Pitt County Health Department from a "disgusted" bar owner by the name of Tony Heath. That Mr. Heath indicated in his message that Live continued to violate the

smoking prohibition law and that Live was informed by it's attorney that the administrative penalties would be waived and that the owners of Live would not have to pay fines. That this bar owner further alleged loss of business and income due to Live's continued violation of the law and was angry that it appeared nothing was being done to stop the smoking.

15. That also on June 21, 2010 at 3:40 p.m. a voicemail message was delivered to a representative of the Pitt County Health Department from Shirley Denton, the owner of Players Choice bar, expressing concern that the owners of Live had not been to court yet. Ms. Denton has also expressed concern previously alleging loss of business and income due to Live's continued violation of the law and upset that smoking continued to be allowed in this establishment.

16. That also on June 21, 2010 at 3:42 p.m. an angry voicemail message was delivered to a representative of the Pitt County Health Department from Steve Denton. This call is transcribed as follows:

"Ms. Morgan, my name is Steve Denton. I'm Shirley Denton's husband. We own Player's Choice billiards and sports bar and I understand uh this court date's been delayed and uh I'm just fed up with y'all not enforcing the law! I want to know why the law is not being enforced. Why are these people still smoking in these d*mn bars in Greenville and you're not stopping it?!? So, matter fact, I'm gonna start back smoking probably as of today. If you come in my place and try to write me a ticket, I'm gonna tear it up in front of you. That's all I got to say about it! Bye."

17. That on June 26, 2010, Pitt County Health Director Dr. John H. Morrow made an unannounced on-site visit to Live and verified continued noncompliance with the law in that the establishment had no signage posted, ash trays were present and there were people smoking within the establishment who were not directed to extinguish their lighted tobacco product.

18. That on June 29, 2010, Lisa Overton, counsel for the Pitt County Health Department, spoke with Jonathan Bridgers, counsel for Live, and advised that the continued

noncompliance of the nightclub had been brought to her attention and that legal action would result if the owners did not immediately comply with the law.

19. That also on June 30, 2010, a letter from the Pitt County Legal Department was delivered to Jonathan Bridgers, counsel for Live, advising him of the repeated efforts made by the Pitt County Health Department to garner his client's compliance with the law and advising that smoking in the enclosed areas of the nightclub must cease immediately to avoid legal action. A copy of this letter from the Pitt County Legal Department is attached hereto as Exhibit D and is incorporated herein by reference.

20. That on July 1, 2010, Attorney Bridgers contacted Attorney Overton to advise that he had consulted with his client Live, that his client was making the necessary changes to comply with the law, and that the Health Director and staff were welcome to visit and verify the establishment's compliance with the law.

21. That based on the representations made by the attorney for Live, the Pitt County Health Director agreed not to seek immediate injunctive relief pursuant to the provisions of N.C. Gen. Stat. §130A-18 on July 1, 2010.

22. That on July 2, 2010, Pitt County Health Director Dr. John H. Morrow made an unannounced on-site visit to Live and verified continued noncompliance with the law. Although there was a "No Smoking" sign posted on the front door and ashtrays had been removed from the tables, patrons were smoking in plain view of bar staff, using cups of water as ashtrays, without being directed to extinguish their lighted tobacco products.

23. That on July 12, 2010 at 8:58 a.m. an angry person calling from (252) 347-4415 delivered a voicemail message to a representative of the Pitt County Environmental Health Department. This call was forwarded to the Pitt County Health Department and is transcribed as follows:

"I just want to tell y'all that if I got to abide by that law – no smoking law . . . I been in three bars tonight and every one of 'em was smoking – Pastimes, Players Choice and Live. If I

got to abide by that law you and (unclear) can take this smoking law and stick it up your g**
d*** a**! I'm not losing no more money! The hell with you! Thank you."

24. That on July 14, 2010, a representative of the Pitt County Health Department made an unannounced on-site visit to Live and verified continued noncompliance with the law. On this date patrons were observed at the bar with ashtrays containing cigarette butts in front of them with at least one patron putting out a cigarette as the Health Department representative approached. The bartender, Sharon Hunter, advised that the ashtrays did not belong to Live, but that the patrons had brought their own ashtrays into the establishment. She further advised that she had asked the patrons to put out their cigarettes several times, but that they would only put out their cigarette to light another one shortly thereafter. Health Department staff reminded Ms. Hunter that it was the responsibility of the establishment to enforce the law and that law enforcement should be called if patrons continued to violate the law.

25. That on July 19, 2010, a letter from the Pitt County Legal Department was delivered to Jonathan Bridgers, counsel for Live, advising him that his client's establishment remained noncompliant with the law and that smoking in the enclosed areas of the nightclub must cease immediately to avoid legal action. A copy of this letter from the Pitt County Legal Department is attached hereto as Exhibit E and is incorporated herein by reference.

26. That on July 31, 2010, a representative of the Pitt County Health Department made an unannounced on-site visit to Live and verified continued noncompliance with the law in that although ashtrays had been removed from the tables, patrons were smoking in plain view of bar staff, using cups of water as ashtrays, without being directed to extinguish their lighted tobacco products.

27. That on August 3, 2010, Lisa Overton, counsel for the Pitt County Health Department, notified Jonathan Bridgers, counsel for Live, via letter that the continued noncompliance of the nightclub had been brought to her attention, that efforts to garner the establishment's compliance had been subverted by the establishment's deceptive practices; and that it was the intent of the Pitt County Health Department to seek immediate injunctive relief

against Live. A copy of this letter from the Pitt County Legal Department is attached hereto as Exhibit F and is incorporated herein by reference.

28. To date, Defendants Benjamin Edwards and Lynn Owens have failed to comply with N.C. Gen Stat. §130A-496, et. seq. and the directives of the Pitt County Health Department to comply with the law prohibiting smoking in the inside areas of their bar establishment.

29. That Defendant Benjamin Edwards and Lynn Owens have knowingly, willfully and continuously violated N.C. Gen Stat. §130A-496, et. seq., a valid public health law, after being advised on numerous occasions by their attorney and Pitt County Health Department staff that their compliance was required.

30. That the numerous attempts made by the Pitt County Health Department to provide educational materials and violation warning letters to garner compliance with the law have been ignored by the Defendants and the Defendants continue to operate their nightclub in violation of the law.

31. That, upon information and belief, the diligent efforts of counsel for the Defendants to encourage his clients' compliance with the law have been ignored as the Defendants have continued to advise their attorney of their compliance while not actually abiding by the law.

32. That the Defendants' violation subjects them to the injunctive relief provisions of North Carolina General Statutes Sections 130A-18, and Pitt County is entitled to equitable relief to prevent, restrain, correct or abate the violations noted above.

33. That the existing noncompliant business establishment presents a public health hazard in that members of the public are being exposed to the harmful effects of second-hand smoke in violation of the law. Additionally, the continued operation of this establishment in violation of the law has created angst and backlash from other establishments who have complied with the law. This condition is one which the Defendants should not be permitted to inflict and the Plaintiff, as the public health agent for the citizens of Pitt County, should not be

required to endure, and is of such a continuous and frequent occurrence as to cause immediate harm and irreparable injury.

34. Plaintiff is without an adequate remedy at law as to these violations by the Defendants and is suffering immediate, irreparable injury in that the continuing violation of the Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment is a health hazard and constitutes an ongoing violation of N.C. Gen. Stat. §130A-496.

35. That the undersigned attorney for the Pitt County Health Director does hereby certify to this Court that the allegations set forth in Paragraphs 8 through 30 of the foregoing Verified Complaint set forth numerous efforts that have been made by the applicant to notify the Defendants of their violation of the smoking prohibition law and impending legal action.

WHEREFORE, the Plaintiff prays the Court as follows:

1. That the Court grant a Restraining Order, without notice or hearing, immediately, restraining the Defendants from operating the Live nightclub in violation of N.C. Gen. Stat. §130A-496, et. seq.

2. That the Court further order the Defendants to immediately cease operation of their nightclub until compliance with N.C. Gen. Stat. §130A-497 is verified by the Pitt County Health Department.

3. That the Court order the Defendants to provide unscheduled access to Live during its regular business hours such that the Pitt County Health Department may verify its compliance with the law.

4. That the Defendants shall strictly adhere to N.C. Gen. Stat. §130A-497 by taking 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.

5. That the Defendants be taxed with all costs and applicable attorney fees associated with this action.

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

This the 3rd day of August, 2010.

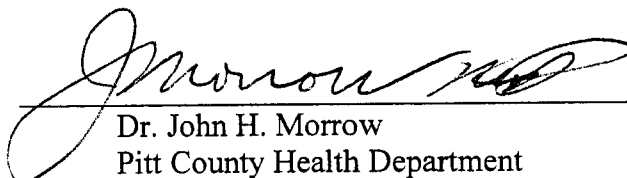
PITT COUNTY LEGAL DEPARTMENT

By: *Lisa Woodard Overton*
Lisa Woodard Overton
Assistant County Attorney for Pitt County
Attorney for Plaintiff
1717 West Fifth Street
Greenville, NC 27834
Phone: (252) 902-3116
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VERIFICATION

I, Dr. John H. Morrow, being first duly sworn, say that I am the Health Director for Pitt County, a political subdivision of the State of North Carolina, and that pursuant to Rule 11(d) of the North Carolina Rules of Civil Procedure I have reviewed the contents of the foregoing Complaint and that the same are true to my own personal knowledge, except as to those matters alleged upon information and belief, and as to those, I believe them to be true.

This the 3rd day of August, 2010.

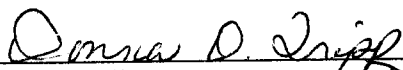


Dr. John H. Morrow
Pitt County Health Department

STATE OF NORTH CAROLINA

COUNTY OF PITT

Sworn to and subscribed before me this 3 day of August, 2010.



Notary Public Donna D. Tripp

My Commission Expires 7-26-2011

