

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 372

Short Title: Clarification of Nuisance Abatement Laws. (Public)

Sponsors: Senator Boseman.

Referred to: Judiciary II.

March 4, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY TYPES OF NUISANCES WHEREIN OBSCENE OR LEWD
3 MATTER OR OTHER CONDUCT PROHIBITED IS INVOLVED.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** G.S. 19-1.2(1) reads as rewritten:

6 "(1) Any and every place in the State where lewd films are publicly exhibited as
7 a predominant ~~and regular~~ course of business, or possessed for the purpose
8 of such exhibition;"

9 **SECTION 2.** G.S. 19-1.1(1a) reads as rewritten:

10 "(1a) "Knowledge" or "knowledge of such nuisance" means having knowledge of
11 the contents and character of the patently offensive sexual conduct which
12 appears in the lewd matter, or knowledge of the acts of lewdness. With
13 regard to nuisances involving assignation, prostitution, gambling, the illegal
14 possession or sale of alcoholic beverages, the illegal possession or sale of
15 controlled substances as defined in the North Carolina Controlled
16 Substances Act, or repeated acts which create and constitute a breach of the
17 ~~peace,~~ peace, or repeated activities or conditions which violate a local
18 ordinance regulating sexually oriented businesses, or evidence that the
19 defendant knew or by the exercise of due diligence should have known of
20 the acts or conduct constitutes proof of knowledge."

21 **SECTION 3.** G.S. 19-1.2(6) reads as rewritten:

22 "(6) Every place ~~which, as a regular course of business, which~~ is used for the
23 purposes of lewdness, assignation, gambling, the illegal possession or sale of
24 alcoholic beverages, the illegal possession or sale of controlled substances as
25 defined in the North Carolina Controlled Substances Act, or prostitution, and
26 every such place in or upon which acts of lewdness, assignation, gambling,
27 the illegal possession or sale of alcoholic beverages, the illegal possession or
28 sale of controlled substances as defined in the North Carolina Controlled
29 Substances Act, or prostitution, are held or occur. Knowledge of,
30 acquiescence to, or participation in activities proscribed by this Chapter by
31 any person charged with maintaining a nuisance shall be prima facie
32 evidence that the person used the place for the purposes of such activities."

33 **SECTION 4.** G.S. 19-1.3(3) reads as rewritten:

34 "(3) All money or other valuable consideration, vehicles, conveyances, or other
35 property received or used in gambling, prostitution, the illegal sale of
36 alcoholic ~~beverages or~~ beverages, the illegal sale of substances proscribed
37 under the North Carolina Controlled Substances Act, Act, or the operation of



1 ~~a sexually oriented business in violation of G.S. 19-1(b1), as well as the~~
2 ~~furniture and movable contents of a place used in connection with such~~
3 ~~prohibited conduct."~~

4 **SECTION 5.** G.S. 19-1.3 is amended by adding a new subdivision to read:

5 "(4) The furniture and movable contents of a place used in connection with
6 conduct prohibited by G.S. 19-1(a), (b), or (b1)."

7 **SECTION 6.** G.S. 19-2.1 reads as rewritten:

8 **"§ 19-2.1. Action for abatement; injunction.**

9 Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney
10 General, district attorney, county, municipality, or any private citizen of the county may
11 maintain a civil action in the name of the State of North Carolina to abate a nuisance under this
12 Chapter, perpetually to enjoin all persons from maintaining the same, and to enjoin the use of
13 any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no
14 private citizen may maintain such action where the alleged nuisance involves the illegal
15 possession or sale of obscene or lewd matter.

16 Upon request from the Attorney General, district attorney, county or municipality,
17 including the sheriff or chief of police of any county or municipality, the Alcohol Law
18 Enforcement Division of the Department of Crime Control and Public Safety or any other law
19 enforcement agency with jurisdiction may investigate alleged public nuisances and make
20 recommendations regarding actions to abate the public nuisances.

21 If an action is instituted by a private person, the complainant shall execute a bond prior to
22 the issuance of a temporary restraining order or a ~~temporary~~ preliminary injunction, with good
23 and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than
24 one thousand dollars (\$1,000), to secure to the party enjoined the damages he may sustain if
25 such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not
26 maintained, or if it is finally decided that the temporary restraining order or preliminary
27 injunction ought not to have been granted. The party enjoined shall have recourse against said
28 bond for all damages suffered, including damages to his property, person, or character and
29 including reasonable attorney's fees incurred by him in making defense to said action. No bond
30 shall be required of the prosecuting attorney, the Attorney General, county, or municipality,
31 and no action shall be maintained against any public official or public entity, their employees,
32 or agents for investigating or maintaining an action for abatement of a nuisance under the
33 provisions of this Chapter."

34 **SECTION 7.** G.S. 19-2.3 reads as rewritten:

35 **"§ 19-2.3. Temporary order restraining removal of personal property from premises;**
36 **service; punishment.**

37 Where such application for a preliminary injunction is made, the court may, on application
38 of the complainant showing good cause, issue an ex parte temporary restraining order in
39 accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant
40 and all other persons from removing or in any manner interfering with any evidence
41 specifically described, or in any manner removing or interfering with the personal property and
42 contents of the place where such nuisance is alleged to exist, until the decision of the court
43 granting or refusing such preliminary injunction and until further order of the court thereon.
44 Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter
45 or the sale of the stock in trade, but an inventory and full accounting of all business transactions
46 involving alleged obscene or lewd matter thereafter shall be required. The inventory provisions
47 provided by this section shall not apply to nuisances occurring at a private dwelling place
48 unless the court finds the private dwelling place is used for profit.

49 Any person, firm, or corporation enjoined pursuant to this section may file with the court a
50 motion to dissolve any temporary restraining order. Such a motion shall be heard within 24
51 hours of the time a copy of the motion is served on the complaining party, or on the next day

1 the superior courts are open in the district, whichever is later. At such hearing the complaining
2 party shall have the burden of showing why the restraining order should be continued.

3 In the event a temporary restraining order is issued, it may be served in accordance with the
4 provisions of G.S. 1A-1, Rule 4, or may be served by handing to and leaving a copy of such
5 order with any person in charge of such place or residing therein, or by posting a copy thereof
6 in a conspicuous place at or upon one or more of the principal doors or entrances to such place,
7 or by such service under said ~~Rule 4, delivery and posting.~~ Rule 4. The officer serving such
8 temporary restraining order shall forthwith enter upon the property and make and return into
9 court an inventory of the personal property and contents situated in and used in conducting or
10 maintaining such nuisance.

11 Any violation of such temporary restraining order is a contempt of court, and where such
12 order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of
13 court, provided such posted order contains therein a notice to that effect."

14 **SECTION 8.** G.S. 19-3(a) reads as rewritten:

15 "(a) The action provided for in this Chapter ~~shall~~ shall, on application of either of the
16 parties, be set down for trial at the first term of the court and shall have precedence over all
17 other cases except crimes, election contests, or injunctions."

18 **SECTION 9.** G.S. 19-6 reads as rewritten:

19 "**§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement;**
20 **invalidation of lease.**

21 Lewd matter is contraband, and there are no property rights therein. All personal property,
22 including all money and other considerations, declared to be a nuisance under the provisions of
23 G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government
24 and are recoverable as damages in the county wherein such matter is sold, exhibited or
25 otherwise used. Such property including moneys may be traced to and shall be recoverable
26 from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys
27 are received by them.

28 Upon judgment against the defendant or defendants in legal proceedings brought pursuant
29 to this Article, an accounting shall be made by such defendant or defendants of all moneys
30 received by them which have been declared to be a nuisance under this Article. An amount
31 equal to the sum of all moneys estimated to have been taken in as gross income from such
32 unlawful commercial activity shall be forfeited to the general funds of the city and county
33 governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits
34 of an unlawful enterprise, and as partial restitution for damages done to the public welfare;
35 provided, however, that no provision of this Article shall authorize the recovery of any moneys
36 or gross income received from the sale of any book, magazine, or exhibition of any motion
37 picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant
38 to this Article, special injury need not be proven, and the costs of abatement are a lien on both
39 the real and personal property used in maintaining the nuisance. Costs of abatement include,
40 but are not limited to, reasonable attorney's fees and court costs.

41 Upon the filing of the action, the plaintiff may file a notice of lis pendens in the official
42 records of the county where the property is located.

43 If it is judicially found after an adversary hearing pursuant to this Article that a tenant or
44 occupant of a building or tenement, under a lawful title, uses such place for the purposes of
45 lewdness, assignation, prostitution, gambling, sale or possession of illegal alcoholic beverages
46 or substances proscribed under the North Carolina Controlled Substances Act, or repeated acts
47 which create and constitute a breach of the ~~peace,~~ peace, or repeated acts or omissions that
48 violate a local ordinance regulating sexually oriented businesses, or such use makes void the
49 lease or other title under which he holds, at the option of the owner, and, without any act of the
50 owner, causes the right of possession to revert and vest in such owner.

1 The clear proceeds of civil penalties and forfeitures provided for in this section, except for
2 penalties and properties that accrue to local governments instead of the State, shall be remitted
3 to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."

4 **SECTION 10.** G.S. 19-6.1 reads as rewritten:

5 **"§ 19-6.1. Forfeiture of real property.**

6 In all actions where a preliminary injunction, permanent injunction, or an order of
7 abatement is issued pursuant to this Article in which the nuisance consists of or includes at least
8 two prior occurrences within five years of the manufacture, possession with intent to sell, or
9 sale of controlled substances as defined by the North Carolina Controlled Substances Act, two
10 prior occurrences of the possession of any controlled substance included within Schedule I or II
11 of that Act, or two prior convictions within five years of violation of G.S. 14-72.7, the real
12 property on which the nuisance exists or is maintained is subject to forfeiture in accordance
13 with this section. In the case of the two prior convictions of G.S. 14-72.7, the convictions shall
14 not arise out of the same transaction or occurrence.

15 If all of the owners of the property are defendants in the action, the plaintiff, other than a
16 plaintiff who is a private citizen, may request forfeiture of the real property as part of the relief
17 sought. If forfeiture is requested, and if jurisdiction over all defendant owners is established,
18 upon judgment against the defendant or defendants, the court shall order forfeiture as follows:

- 19 (1) If the court finds by clear and convincing evidence that all the owners either
20 (i) have participated in maintaining the nuisance on the property, or (ii) prior
21 to the action had written notice from the plaintiff, or any governmental agent
22 or entity authorized to bring an action pursuant to this Chapter, that the
23 nuisance existed or was maintained on the property and have not made good
24 faith efforts to stop the nuisance from occurring or recurring, the court shall
25 order that the property be forfeited;
- 26 (2) If the court finds that one or more of the owners did not participate in
27 maintaining the nuisance on the property or did not have written notice from
28 the plaintiff prior to the action that the nuisance existed or was maintained
29 on the property, the court shall not order forfeiture of the property
30 immediately upon judgment. However, if after judgment and an order
31 directing the defendants to abate the nuisance, the nuisance either continues,
32 begins again, or otherwise recurs within five years of the order and the
33 defendants have not made good faith efforts to abate the nuisance, the
34 plaintiff may petition the court for forfeiture. Upon such petition, the
35 defendant owner or owners shall be given notice and an opportunity to
36 appear and be heard at a hearing to determine the continuation or recurrence
37 of the nuisance. If, in this hearing (i) the plaintiff establishes by clear and
38 convincing evidence that the nuisance, with the owner's or owners'
39 knowledge, has either continued, begun again, or otherwise recurred, and (ii)
40 the defendants fail to establish that they have made and are continuing to
41 make good faith efforts to abate the nuisance, the court shall order that the
42 property be forfeited.

43 For the purposes of this section, factors which may evidence good faith by the defendant to
44 abate the nuisance include but are not limited to (i) cooperation with law enforcement
45 authorities to abate the nuisance; (ii) lease restrictions prohibiting the illegal possession or sale
46 of ~~narcotic drugs~~ controlled substances and an action to evict a tenant for any violations of the
47 lease provision; (iii) a criminal record check of prospective tenants; and (iv) reference checks
48 of prior residency of prospective tenants.

49 Upon an order of forfeiture, title to the property shall vest in the school board of the county
50 in which the property is located. If at the time of forfeiture the property is subject to a lien or
51 security interest of a person not participating in the maintenance of the nuisance, the school

1 board shall either (i) pay an amount to that person satisfying the lien or security interest; or (ii)
2 sell the property and satisfy the lien or security interest from the proceeds of the sale. If the
3 property is not subject to any lien or security interest at the time of forfeiture, the school board
4 may hold, maintain, lease, sell, or otherwise dispose of the property as it sees fit.

5 Upon the filing of the action, the plaintiff may file a notice of lis pendens in the official
6 records of the county where the property is located. If the plaintiff files a notice of lis pendens,
7 any person purchasing or obtaining an interest in the property thereafter shall be considered to
8 have notice of the alleged nuisance, and shall forfeit his interest in the property upon a
9 judgment of forfeiture in favor of the plaintiff.

10 If in the same action in which real property is forfeited the court finds that a tenant or
11 occupant of the property participated in or maintained the nuisance, the lease or other title
12 under which the tenant or occupant holds is void, and the right of possession vests in the new
13 owner. Upon forfeiture, the rights of innocent tenants occupying separate units of the property
14 who were not involved in the nuisance at the time the action was filed shall be in accordance
15 with any relevant lease provisions in effect at the time or, in the absence of relevant lease
16 provisions, in accordance with the law applying to other tenants or occupants of property that is
17 sold, foreclosed upon, or otherwise obtained by new owners."

18 **SECTION 11.** This act becomes effective October 1, 2009, and applies to offenses
19 committed and abatement actions commenced on or after that date.