

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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SENATE BILL 929

Short Title: Abatement of Nuisances.

(Public)

Sponsors: Senator Reeves.

Referred to: Judiciary II.

April 14, 1999

A BILL TO BE ENTITLED

AN ACT TO REVISE THE ABATEMENT OF NUISANCES STATUTES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 19-1(a) reads as rewritten:

"(a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of alcoholic beverages, illegal possession or sale of ~~narcotic~~ ~~drugs~~-controlled substances as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance."

Section 2. G.S. 19-1.1 reads as rewritten:

"§ 19-1.1. Definitions.

As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19- 1, the following definitions shall apply:

(1) 'Assignation' means making an appointment or engagement for prostitution or solicitation for acts of prostitution or any act in furtherance of the appointment, engagement, or solicitation.

(2) 'Breach of the peace' means any act that disturbs the public tranquility and order including, but not limited to, homicide, assault, affray, communicating threats, stalking, loud obscene or abusive language,

1 unlawful possession of dangerous or deadly weapons, and discharging
2 firearms.

3 (3) 'Knowledge' or 'knowledge of such nuisance' means having knowledge
4 of the contents and character of the patently offensive sexual conduct
5 which appears in the lewd matter, or knowledge of the acts of ~~lewdness,~~
6 ~~assignation, gambling, the illegal possession or sale of alcoholic beverages,~~
7 ~~the illegal possession or sale of narcotic drugs as defined in the North~~
8 ~~Carolina Controlled Substances Act, or prostitution which occur on the~~
9 ~~premises.~~ lewdness. With regard to nuisances involving assignation,
10 prostitution, gambling, the illegal possession or sale of alcoholic
11 beverages, the illegal possession or sale of controlled substances as
12 defined in the North Carolina Controlled Substances Act, or repeated
13 acts which create and constitute a breach of the peace, evidence that the
14 defendant knew or by the exercise of due diligence should have known
15 of the acts or conduct constitutes proof of knowledge.

16 ~~(2)~~(4) 'Lewd matter' is synonymous with 'obscene matter' and means any
17 matter:

- 18 a. Which the average person, applying contemporary community
19 standards, would find, when considered as a whole, appeals to
20 the prurient interest; and
21 b. Which depicts patently offensive representations of:
22 1. Ultimate sexual acts, normal or perverted, actual or
23 simulated;
24 2. Masturbation, excretory functions, or lewd exhibition of
25 the genitals or genital area;
26 3. Masochism or sadism; or
27 4. Sexual acts with a child or animal.

28 Nothing herein contained is intended to include or proscribe any writing
29 or written material, nor to include or proscribe any matter which, when
30 considered as a whole, and in the context in which it is used, possesses
31 serious literary, artistic, political, educational, or scientific value.

32 ~~(3)~~(5) 'Lewdness' is synonymous with obscenity and shall mean the act of
33 selling, exhibiting or possessing for sale or exhibition lewd matter.

34 ~~(4)~~(6) 'Matter' means a motion picture film or a publication or both.

35 ~~(5)~~(7) 'Motion picture film' shall include any:

- 36 a. Film or plate negative;
37 b. Film or plate positive;
38 c. Film designed to be projected on a screen for exhibition;
39 d. Films, glass slides or transparencies, either in negative or positive
40 form, designed for exhibition by projection on a screen;
41 e. Video tape-tape, compact disc, digital video disc or any other
42 medium used to electronically reproduce images on a screen.

- 1 ~~(6)~~(8) 'Person' means any individual, partnership, firm, association,
2 corporation, or other legal entity.
- 3 ~~(7)~~(9) 'Place' includes, but is not limited to, any building, structure or places,
4 or any separate part or portion thereof, whether permanent or not, or the
5 ground itself, ~~but excluding a private dwelling place not used for a profit~~
6 itself.
- 7 (10) 'Prostitution' means offering in any manner or receiving of the body in
8 return for a fee, for acts of vaginal intercourse, anal intercourse, fellatio,
9 cunnilingus, masturbation, or physical contact with a person's genitals,
10 pubic area, buttocks or breasts, or other acts of sexual conduct offered
11 or received for pay and sexual gratification.
- 12 (11) 'Preserving the status quo' as used in G.S. 19-2.3 means returning
13 conditions to the last actual, peaceable, lawful, and nonconstested status
14 which preceded the pending controversy and not allow the nuisance to
15 continue.
- 16 ~~(8)~~(12) 'Publication' shall include any book, magazine, pamphlet, illustration,
17 photograph, picture, sound recording, or a motion picture film which is
18 offered for sale or exhibited in a coin-operated machine.
- 19 ~~(9)~~(13) 'Sale' 'Sale of obscene or lewd matter' means a passing of title or right of
20 possession from a seller to a buyer for valuable consideration, and shall
21 include, but is not limited to, any lease or rental arrangement or other
22 transaction wherein or whereby any valuable consideration is received
23 for the use of, or transfer or possession of, lewd matter.
- 24 ~~(4)~~(14) 'Sale' as the term relates to proscribed acts other than sale of obscene
25 or lewd matter shall have the same meaning as the term is defined in
26 Chapter 18B and Chapter 90 of the General Statutes prohibiting the
27 illegal sale of alcoholic beverages and controlled substances
28 respectively.
- 29 (15) 'Used for profit' shall mean any use of real or personal property to
30 produce income in any manner, including, but not limited to, any
31 commercial or business activities, or selling, leasing, or otherwise
32 providing goods and services for profit."

33 Section 3. G.S. 19-1.2 reads as rewritten:

34 **"§ 19-1.2. Types of nuisances.**

35 The following are declared to be nuisances wherein obscene or lewd matter or other
36 conduct prohibited in G.S. 19-1(a) is involved:

- 37 (1) Any and every place in the State where lewd films are publicly
38 exhibited as a predominant and regular course of business, or possessed
39 for the purpose of such exhibition;
- 40 (2) Any and every place in the State where a lewd film is publicly and
41 repeatedly exhibited, or possessed for the purpose of such exhibition;
- 42 (3) Any and every lewd film which is publicly exhibited, or possessed for
43 such purpose at a place which is a nuisance under this Article;

- 1 (4) Any and every place of business in the State in which lewd publications
2 constitute a principal or substantial part of the stock in trade;
3 (5) Any and every lewd publication possessed at a place which is a
4 nuisance under this Article;
5 (6) Every place which, as a regular course of business, is used for the
6 purposes of lewdness, assignation, gambling, the illegal possession or
7 sale of alcoholic beverages, the illegal possession or sale of ~~narcotic~~
8 ~~drugs~~ controlled substances as defined in the North Carolina Controlled
9 Substances Act, or prostitution, and every such place in or upon which
10 acts of lewdness, assignation, gambling, the illegal possession or sale of
11 alcoholic beverages, the illegal possession or sale of ~~narcotic~~ ~~drugs~~
12 controlled substances as defined in the North Carolina Controlled
13 Substances Act, or prostitution, are held or occur."

14 Section 4. G.S. 19-1.3 reads as rewritten:

15 "**§ 19-1.3. Personal property as a nuisance; knowledge of nuisance.**

16 The following are also declared to be nuisances, as personal property used in
17 conducting and maintaining a nuisance under this Chapter:

- 18 (1) All moneys paid as admission price to the exhibition of any lewd film
19 found to be a nuisance;
20 (2) All valuable consideration received for the sale of any lewd publication
21 which is found to be a nuisance;
22 (3) All money or other valuable ~~consideration~~ consideration, vehicles,
23 conveyances, or other property received or used in gambling,
24 prostitution, the illegal sale of alcoholic beverages or the illegal sale of
25 substances proscribed under the North Carolina Controlled Substances
26 Act, as well as the furniture and movable contents of a place used in
27 connection with such prohibited conduct.

28 From and after service of a copy of the notice of hearing of the application for a
29 preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its manager, or
30 acting manager, or person then in charge, all such parties are deemed to have knowledge
31 of the contents of the restraining order and the use of the place occurring thereafter.
32 Where the circumstantial proof warrants a determination that a person had knowledge of
33 the nuisance prior to such service of process, the court may make such finding."

34 Section 5. Chapter 19 of the General Statutes is amended by adding a new
35 section to read:

36 "**§ 19-1.6. Cessation of nuisance does not preclude action.**

37 The cessation of nuisance activities does not preclude an action for abatement of a
38 nuisance based on its past operation."

39 Section 6. G.S. 19-2. Repealed.

40 Section 7. G.S. 19-2.1 reads as rewritten:

41 "**§ 19-2.1. Action for abatement; injunction.**

42 Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the
43 Attorney General, district attorney, county, municipality, or any private citizen of the

1 county may maintain a civil action in the name of the State of North Carolina to abate a
2 nuisance under this Chapter, perpetually to enjoin all persons from maintaining the same,
3 and to enjoin the use of any structure or thing adjudged to be a nuisance under this
4 Chapter; provided, however, that no private citizen may maintain such action where the
5 alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

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

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

25 The provisions of this Chapter to abate a public nuisance shall not be applied against
26 the State or any of its political subdivisions."

27 Section 8. G.S. 19-2.3 reads as rewritten:

28 **"§ 19-2.3. Temporary order restraining removal of personal property from**
29 **premises; service; punishment.**

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

1 Any person, firm, or corporation enjoined pursuant to this section may file with the
2 court a motion to dissolve any temporary restraining order. Such a motion shall be heard
3 within 24 hours of the time a copy of the motion is served on the complaining party, or
4 on the next day the superior courts are open in the district, whichever is later. At such
5 hearing the complaining party shall have the burden of showing why the restraining order
6 should be continued.

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

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

18 Section 9. G.S. 19-2.5 reads as rewritten:

19 "**§ 19-2.5. Hearing on the preliminary injunction; issuance.**

20 If upon hearing, the allegations of the complaint are sustained to the satisfaction of the
21 court, the court shall issue a preliminary injunction restraining the defendant and any
22 other person from continuing the nuisance and effectually enjoining its use thereafter for
23 the purpose of conducting any such nuisance. The court may in its discretion order the
24 closure of the property pending trial on the merits."

25 Section 10. G.S. 19-3(b) reads as rewritten:

26 "(b) In such action, an admission or finding of guilt of any person under the
27 criminal laws against lewdness, assignation, prostitution, gambling, breaches of the
28 peace, the illegal possession or sale of alcoholic beverages, or the illegal possession or
29 sale of substances proscribed by the North Carolina Controlled Substances Act, at any
30 such place, is admissible for the purpose of proving the existence of said nuisance, and is
31 evidence of such nuisance and of knowledge of, and of acquiescence and participation
32 therein, on the part of the person charged with maintaining said nuisance."

33 Section 11. G.S. 19-6 reads as rewritten:

34 "**§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement;**
35 **invalidation of lease.**

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

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

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

17 If it is judicially found after an adversary hearing pursuant to this Article that a tenant
18 or occupant of a building or tenement, under a lawful title, uses such place for the
19 purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal
20 alcoholic beverages or substances proscribed under the North Carolina Controlled
21 Substances Act, or repeated acts which create and constitute a breach of the peace, such
22 use makes void the lease or other title under which he holds, at the option of the owner,
23 and, without any act of the owner, causes the right of possession to revert and vest in
24 such owner.

25 ~~The clear proceeds of civil penalties and forfeitures provided for in this section,~~
26 ~~except for penalties and properties that accrue to local governments instead of the State,~~
27 ~~shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-~~
28 ~~457.2."~~

29 Section 12. G.S. 19-6.1 reads as rewritten:

30 "**§ 19-6.1. Forfeiture of real property.**

31 In all actions where a preliminary injunction, permanent injunction, or an order of
32 abatement is issued pursuant to this Article in which the nuisance consists of or includes
33 at least two prior occurrences within five years of the ~~illegal possession or sale of narcotic~~
34 ~~drugs as defined in G.S. 90-87(17),~~ manufacture, possession with intent to sale, or sale of
35 controlled substances as defined by the North Carolina Controlled Substances Act, or two
36 prior occurrences of the possession of any controlled substance included within Schedule
37 I or II of that Act, the real property on which the nuisance exists or is maintained is
38 subject to forfeiture in accordance with this section.

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

- 1 (1) If the court finds by clear and convincing evidence that all the owners
2 either (i) have participated in maintaining the nuisance on the property,
3 or (ii) prior to the action had written notice from the plaintiff prior to the
4 action-plaintiff, or any governmental agent or entity authorized to bring
5 an action pursuant to this Chapter, that the nuisance existed or was
6 maintained on the property and have not made good faith efforts to stop
7 the nuisance from occurring or recurring, the court shall order that the
8 property be forfeited;
- 9 (2) If the court finds that one or more of the owners did not participate in
10 maintaining the nuisance on the property or did not have written notice
11 from the plaintiff prior to the action that the nuisance existed or was
12 maintained on the property, the court shall not order forfeiture of the
13 property immediately upon judgment. However, if after judgment and
14 an order directing the defendants to abate the nuisance, the nuisance
15 either continues, begins again, or otherwise recurs within five years of
16 the order and the defendants have not made good faith efforts to abate
17 the nuisance, the plaintiff may petition the court for forfeiture. Upon
18 such petition, the defendant owner or owners shall be given notice and
19 an opportunity to appear and be heard at a hearing to determine the
20 continuation or recurrence of the nuisance. If, in this hearing (i) the
21 plaintiff establishes by clear and convincing evidence that the nuisance,
22 with the owner's or owners' knowledge, has either continued, begun
23 again, or otherwise recurred, and (ii) the defendants fail to establish that
24 they have made and are continuing to make good faith efforts to abate
25 the nuisance, the court shall order that the property be forfeited.

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

32 Upon an order of forfeiture, title to the property shall vest in the school board of the
33 county in which the property is located. If at the time of forfeiture the property is subject
34 to a lien or security interest of a person not participating in the maintenance of the
35 nuisance, the school board shall either (i) pay an amount to that person satisfying the lien
36 or security interest; or (ii) sell the property and satisfy the lien or security interest from
37 the proceeds of the ~~sale and additional monies, if necessary.~~ sale. If the property is not
38 subject to any lien or security interest at the time of forfeiture, the school board may hold,
39 maintain, lease, sell, or otherwise dispose of the property as it sees fit.

40 Upon the filing of the action, the plaintiff may file a notice of lis pendens in the
41 official records of the county where the property is located. If the plaintiff files a notice
42 of lis pendens, any person purchasing or obtaining an interest in the property thereafter

1 shall be considered to have notice of the alleged nuisance, and shall forfeit his interest in
2 the property upon a judgment of forfeiture in favor of the plaintiff.

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

12 Section 13. This act becomes effective October 1, 1999.