

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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SENATE BILL 929

State and Local Government Committee Substitute Adopted 4/29/99

Short Title: Abatement of Nuisances.

(Public)

Sponsors:

Referred to:

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:

(0.1) 'Breach of the peace' means repeated acts that disturb the public order including, but not limited to, homicide, assault, affray, communicating threats, unlawful possession of dangerous or deadly weapons, and discharging firearms.

- 1 (1) 'Knowledge' or 'knowledge of such nuisance' means having knowledge
2 of the contents and character of the patently offensive sexual conduct
3 which appears in the lewd matter, or knowledge of the acts of ~~lewdness,~~
4 ~~assignation, gambling, the illegal possession or sale of alcoholic beverages,~~
5 ~~the illegal possession or sale of narcotic drugs as defined in the North~~
6 ~~Carolina Controlled Substances Act, or prostitution which occur on the~~
7 ~~premises.~~ lewdness. With regard to nuisances involving assignation,
8 prostitution, gambling, the illegal possession or sale of alcoholic
9 beverages, the illegal possession or sale of controlled substances as
10 defined in the North Carolina Controlled Substances Act, or repeated
11 acts which create and constitute a breach of the peace, evidence that the
12 defendant knew or by the exercise of due diligence should have known
13 of the acts or conduct constitutes proof of knowledge.
- 14 (2) 'Lewd matter' is synonymous with 'obscene matter' and means any
15 matter:
16 a. Which the average person, applying contemporary community
17 standards, would find, when considered as a whole, appeals to
18 the prurient interest; and
19 b. Which depicts patently offensive representations of:
20 1. Ultimate sexual acts, normal or perverted, actual or
21 simulated;
22 2. Masturbation, excretory functions, or lewd exhibition of
23 the genitals or genital area;
24 3. Masochism or sadism; or
25 4. Sexual acts with a child or animal.
- 26 Nothing herein contained is intended to include or proscribe any writing
27 or written material, nor to include or proscribe any matter which, when
28 considered as a whole, and in the context in which it is used, possesses
29 serious literary, artistic, political, educational, or scientific value.
- 30 (3) 'Lewdness' is synonymous with obscenity and shall mean the act of
31 selling, exhibiting or possessing for sale or exhibition lewd matter.
- 32 (4) 'Matter' means a motion picture film or a publication or both.
- 33 (5) 'Motion picture film' shall include any:
34 a. Film or plate negative;
35 b. Film or plate positive;
36 c. Film designed to be projected on a screen for exhibition;
37 d. Films, glass slides or transparencies, either in negative or positive
38 form, designed for exhibition by projection on a screen;
39 e. ~~Video tape~~ video tape, compact disc, digital video disc or any other
40 medium used to electronically reproduce images on a screen.
- 41 (6) 'Person' means any individual, partnership, firm, association,
42 corporation, or other legal entity.

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

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

32 **"§ 19-1.2. Types of nuisances.**

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

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

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

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

13 **"§ 19-1.3. Personal property as a nuisance; knowledge of nuisance.**

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

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

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

32 Section 5. G.S. 19-2.1 reads as rewritten:

33 **"§ 19-2.1. Action for abatement; injunction.**

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

41 Upon request from the Attorney General, district attorney, county or municipality,
42 including the sheriff or chief of police of any county or municipality, the Alcohol Law
43 Enforcement Division of the Department of Crime Control and Public Safety or any other

1 law enforcement agency with jurisdiction may investigate alleged public nuisances and
2 make recommendations regarding actions to abate the public nuisances.

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

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

19 Section 6. G.S. 19-2.3 reads as rewritten:

20 **"§ 19-2.3. Temporary order restraining removal of personal property from**
21 **premises; service; punishment.**

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

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

41 In the event a temporary restraining order is issued, it may be served in accordance
42 with the provisions of G.S. 1A-1, Rule 4, or may be served by handing to and leaving a
43 copy of such order with any person in charge of such place or residing therein, or by

1 posting a copy thereof in a conspicuous place at or upon one or more of the principal
2 doors or entrances to such place, or by such service under said Rule 4, delivery and
3 posting. The officer serving such temporary restraining order shall forthwith make and
4 return into court an inventory of the personal property and contents situated in and used
5 in conducting or maintaining such nuisance.

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

9 Section 7. G.S. 19-2.5 reads as rewritten:

10 **"§ 19-2.5. Hearing on the preliminary injunction; issuance.**

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

16 Section 8. G.S. 19-3(b) reads as rewritten:

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

24 Section 9. G.S. 19-6 reads as rewritten:

25 **"§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement;**
26 **invalidation of lease.**

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

34 Upon judgment against the defendant or defendants in legal proceedings brought
35 pursuant to this Article, an accounting shall be made by such defendant or defendants of
36 all moneys received by them which have been declared to be a nuisance under this
37 Article. An amount equal to the sum of all moneys estimated to have been taken in as
38 gross income from such unlawful commercial activity shall be forfeited to the general
39 funds of the city and county governments wherein such activity took place, to be shared
40 equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for
41 damages done to the public welfare; provided, however, that no provision of this Article
42 shall authorize the recovery of any moneys or gross income received from the sale of any
43 book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary

1 injunction. Where the action is brought pursuant to this Article, special injury need not be
2 proven, and the costs of abatement are a lien on both the real and personal property used
3 in maintaining the nuisance. Costs of abatement include, but are not limited to,
4 reasonable attorney's fees and court costs.

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

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

15 Section 10. G.S. 19-6.1 reads as rewritten:

16 **"§ 19-6.1. Forfeiture of real property.**

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

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

30 (1) If the court finds by clear and convincing evidence that all the owners
31 either (i) have participated in maintaining the nuisance on the property,
32 or (ii) prior to the action had written notice from the plaintiff prior to the
33 ~~action~~ plaintiff, or any governmental agent or entity authorized to bring
34 an action pursuant to this Chapter, that the nuisance existed or was
35 maintained on the property and have not made good faith efforts to stop
36 the nuisance from occurring or recurring, the court shall order that the
37 property be forfeited;

38 (2) If the court finds that one or more of the owners did not participate in
39 maintaining the nuisance on the property or did not have written notice
40 from the plaintiff prior to the action that the nuisance existed or was
41 maintained on the property, the court shall not order forfeiture of the
42 property immediately upon judgment. However, if after judgment and
43 an order directing the defendants to abate the nuisance, the nuisance

1 either continues, begins again, or otherwise recurs within five years of
2 the order and the defendants have not made good faith efforts to abate
3 the nuisance, the plaintiff may petition the court for forfeiture. Upon
4 such petition, the defendant owner or owners shall be given notice and
5 an opportunity to appear and be heard at a hearing to determine the
6 continuation or recurrence of the nuisance. If, in this hearing (i) the
7 plaintiff establishes by clear and convincing evidence that the nuisance,
8 with the owner's or owners' knowledge, has either continued, begun
9 again, or otherwise recurred, and (ii) the defendants fail to establish that
10 they have made and are continuing to make good faith efforts to abate
11 the nuisance, the court shall order that the property be forfeited.

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

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

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

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

40 Section 11. This act becomes effective October 1, 1999.