

spotlight

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LET THE DOGS IN

Restaurant Owners, Not the State, Should Decide Whether to Permit Pets

KEY FACTS: • On February 1, 2010, the North Carolina Commission for Public Health published a proposed rule addressing whether pets may be allowed in restaurants.

• Not unlike the smoking ban, whether pets are allowed in restaurants is a property rights issue.

• Just like a homeowner can decide whether a dog can come in his house, the restaurant owner has that same right with respect to his restaurant. A property owner does not lose his property rights because a business is open to the public—it still is private property.

• There is no conflict between property rights and health rights. Restaurant patrons can see for themselves whether pets are allowed and can make informed and voluntary decisions on their own as to whether they want to dine at a restaurant.

• Furthermore, there is little to no evidence of any legitimate health risks associated with having pets in any dining area. The Division of Environmental Health was unable to provide *one* example of restaurant patrons becoming ill owing to the presence of pets.

• Although the Commission's proposed rule attempts to allow pets in outdoor dining areas only, its language would likely prohibit even that.

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On February 1, 2010, the North Carolina Commission for Public Health (Commission) published a proposed rule addressing whether pets may be allowed in restaurants.¹ This issue is a significant property rights question directly analogous to the smoking ban.

Property owners should be able to decide for themselves whether pets are allowed at their restaurants. The Commission's alleged intent was to allow pets in outdoor areas of restaurants; however, the rule's language as drafted would not achieve that objective.

This *Spotlight* first explains why, given a proper understanding of property rights, restaurant owners should be allowed to decide whether pets are per-

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mitted in both indoor *and* outdoor dining areas. It then discusses the legal problems with the Commission's proposed rule.

Restaurant Owners Should Decide Whether to Allow Pets in Indoor and Outdoor Dining Areas

A Property Rights Issue

Not unlike the recent state legislation banning smoking in restaurants and bars,² whether pets are allowed in restaurants is a property rights issue. A restaurant owner has the right to decide what happens on his property. Just like a homeowner can decide whether a dog can come in his house, the restaurant owner has that same right with respect to his restaurant. A property owner does not lose his property rights because a business is open to the public—it still is private property.

The public has no right to go to any restaurant they want without being around pets. Further, pet owners have no right to bring their pets to a restaurant. The decision on whether pets are allowed in restaurants should be solely up to the proprietors of the restaurant.

Property Rights v. Health Rights

As in the smoking ban debate,³ the pet ban issue is posed as presenting a conflict between property rights and health rights. This notion of conflict is a red herring. Regardless of whether health rights even exist, individuals have complete control over the choice to put themselves at any alleged health risk. There would be a conflict only if restaurant patrons (or employees) were forced to be in the same dining area as pets.

This issue also is completely distinct from regulating restaurants for hidden health risks. Having an inspector ensure that proper health and sanitation steps are taken behind the scenes is an appropriate action because restaurant patrons are unable to make informed choices when the risks are hidden.

When it comes to pets, restaurant patrons can see for themselves whether pets are allowed and can make informed and voluntary decisions on their own as to whether they want to dine at the restaurant.

A Rule in Search of a Problem: No Evidence of Health Risks

Furthermore, there is little to no evidence of any legitimate health risks associated with having pets in any dining area. In response to this author's request for scientific support of its proposed ban on pets at restaurants, the Division of Environmental Health (DEH, the office that develops the rule for the Commission) was unable to provide *one* example of restaurant patrons becoming ill owing to the presence of pets.

DEH did provide several documents from the Alexandria Virginia Health Department. In an April 16, 2004 memo,⁴ the Alexandria health department attempted to give some examples of pet and dining-related health incidents in Alexandria, but in their two examples, they could not even remotely conclude that pets were the problem.

Options Exist Besides a Ban

Unlike with secondhand smoke, any health risks associated with pets in dining areas can be addressed without a ban on allowing them in an indoor or outdoor dining area. While dividing a restaurant between smoking and nonsmoking sections is allegedly unsatisfactory because smoke can enter the smoke-free section, the health risks from pets can be contained.

There are demonstrable health risks to diners when kitchen staff use the restroom or cut themselves. The solution, however, is not to ban staff from using the restroom or cooking after cutting themselves, but to take common-sense

steps to reduce the risks (hand washing, safety procedures, proper first aid, etc.). The same respect for common sense should be all that is necessary for allowing pets in dining areas.

If there is a concern that pets will touch dining-related items, then the DEH should require that those items be cleaned immediately. If there is a concern that staff will touch the pets, then there could be a requirement that staff take the appropriate sanitary steps, such as washing their hands.

Recommendation

The Commission for Public Health should let restaurant owners decide whether to allow pets in both indoor and outdoor dining areas. It would not mean that all restaurants would have to allow pets, but it would give each restaurant owner the option to allow or forbid pets. In many instances, the owners would not want to allow pets—they would base their decision on the needs of their specific customers, not the unrelated needs of people who would never step inside their restaurants.

One state provides an example of what North Carolina should do. The New Hampshire House recently passed a bill⁵ that would allow dogs in both indoor and outdoor dining areas. If the language was broadened to include all pets, it would be a very good model:

A restaurant owner *may allow*, at the restaurant owner's discretion, any person possessing a properly disciplined companion dog inside his or her place of business. Such dogs shall not be allowed in food preparation or production areas. Restaurant owners allowing companion dogs shall prominently display a sign at all public entrances advising patrons that companion dogs are allowed on the premises.⁶ [Emphasis added.]

This language allows restaurant owners to decide if dogs are permitted in both indoor and outdoor dining areas, and does create some reasonable prohibitions. For example, dogs are prohibited in food preparation or production areas. To ensure that restaurant patrons are making an informed and voluntary choice about being around dogs, the law would require a prominent notice.

The Problem with the Commission's Proposed Language

The Commission's proposed rule would allow:

pets in outdoor dining areas; provided that pets shall not pass through any indoor areas of the food service establishment and shall not come into contact with employees engaged in the preparation or handling of food, utensils, or other items that may result in contamination of food or food contact surfaces. Nothing in this Rule prohibits a food service establishment from prohibiting pets in outdoor dining areas.⁷

Coming into Contact with Employees

The first problem is the language indicates that pets “shall not come into contact with *employees* engaged in the preparation or handling of food, *utensils, or other items that may result in contamination of food or food contact surfaces.*” [Emphasis added.]

Wait staff and hosts/hostesses regularly handle utensils or other items that may result in contamination of food or food contact surfaces. The question then becomes what does it mean for a pet to “come into contact” with employees?

It could be argued that it means a pet must *physically contact* the employee, which would certainly be a fair reading. It also could be much broader, however, and instead mean, for example, being *in the proximity of a pet*. There are numerous definitions⁸ of the word “contact,” and interpretation certainly changes within the context of the situation.

For example, if one were to communicate that children in day care centers may not come into contact with dogs, a likely understanding would be that it means children should not be in the proximity of dogs, not that children should not touch them. The same interpretation could just as easily be applied to the vague language in the proposed regulations.

Even if the language means physical contact, it would not change the fact that restaurants would never want to allow pets in outdoor dining areas if they thought they would get into trouble if wait staff were touched by a pet. There is simply no way that a restaurant would be able to prevent pets from touching wait staff. As a result, this language alone would act as a prohibition on pets in outdoor dining areas.

From this author's discussions with the DEH, the intent was for *pets*, as opposed to employees, not to come into contact with "utensils or other items that may result in contamination of food or food contact surfaces." The DEH also clarified that "comes into contact" is supposed to mean "physical contact." If such is the case, the language needs to be clearer on those points.

If the language were read to mean "in the proximity of employees," then pets could never be allowed because wait staff would always be in the proximity of pets (except possibly in self-service dining areas).

Coming into Contact with Utensils

Even if the language were to prohibit restaurants from allowing pets to physically contact a tablecloth, a napkin, or a table, among other things, the prohibition would be so broad that it would keep many restaurants from allowing pets. If a dog touched a tablecloth once, would that be a violation? When would an adverse action be taken against a restaurant—would it simply be left to the subjective discretion of an inspector?

A rule needs to provide "bright line" guidance for restaurants. There should not be an expectation of the impossible, such as a pet never touching a napkin.

In other words, the proposed regulations would force restaurant owners who would want to allow pets to worry about not getting caught, instead of providing them some feasible requirements that would make them feel comfortable enough under the regulations to allow pets.

In recent years, a few state legislatures have removed statutory bans on pets in food service establishments.⁹ Some of the new statutes address the specific concern that the DEH attempts to address regarding pets touching dining-related items, but they do so in a much better manner by creating a requirement with which restaurants can actually comply. The neighboring state of Tennessee, for example, requires that:

Employees and patrons shall be instructed that they shall not allow pet dogs to come into contact with serving dishes, utensils, tableware, linens, paper products, or any other items involved in food service operations.¹⁰

The benefits of this language over the proposed language include:

1) Restaurants have a clear bright line requirement to follow—they must provide clear instructions to employees and patrons. The requirement concerns things *within their control*, as opposed to trying to prohibit a dog from touching a napkin.

2) The language is far more specific as to what pets may not contact.

Recommended Language

Assuming that pets would be allowed in outdoor dining areas only, and using the DEH's language as a starting point, the following language should suffice to allow:

pets in outdoor dining areas; provided that pets shall not pass through any indoor areas of the food service establishment and shall not physically contact employees engaged in the preparation or handling of food. Employees and patrons shall be instructed that they shall not allow pets physically to contact serving dishes, utensils, tableware, linens, paper products, or other items involved in food service operations. Nothing in this Rule prohibits a food service establishment from prohibiting pets in outdoor dining areas.

This language is consistent with what the DEH seeks to accomplish, is clear, and places compliance outside the behavior of a canine.

Conclusion

The proposed rule, at a minimum, needs to be fixed so that it clearly allows pets in outdoor areas. A ban on pets in indoor dining areas would not be consistent with a respect for property rights nor is it supportable by any scientific evidence. Other than political appeasement, there also has been no argument made concerning pets in outdoor dining areas are somehow less problematic than pets in indoor dining areas.

The Commission should adopt a rule that is similar to the language passed by the New Hampshire House. Restaurant owners should be allowed to decide whether to permit pets in indoor and outdoor dining areas. Restaurant owners are much better suited than the state to determine if pets should be allowed in their restaurants. Creating a one-size-fits-all pet ban is inconsistent with a respect for property rights and personal freedom.

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End Notes

1. The rule addresses whether pets may be allowed in food service establishments, which would cover more than restaurants. For readability purposes, I have used “restaurants” in the text of the paper instead of “food service establishments,” but “restaurants” as used in the paper, covers food service establishments.
2. General Assembly of North Carolina, S.L. 2009-27, <http://www.ncga.state.nc.us/Sessions/2009/Bills/House/HTML/H2v10.html>.
3. See, e.g., Emery P. Dalesio, “NC House committee debates public smoking ban,” Associated Press, February 27, 2009.
4. Memorandum of Agreement between the Alexandria Health Department and Holiday Inn–Old Town, April 5, 2004.
5. General Assembly of New Hampshire, Session 2010, House Bill 1417, <http://www.gencourt.state.nh.us/legislation/2010/HB1417.html>.
6. *Ibid.*
7. Proposed Rule Amending 15A NCAC 18A .2633, *North Carolina Register*, Feb. 1, 2010, Vol. 24, No. 15, page 1249, <http://www.oah.state.nc.us/rules/register/Volume24Issue15February12010.pdf>.
8. Definition of “contact,” Houghton Mifflin, Yahoo! Education web site, <http://education.yahoo.com/reference/dictionary/entry/contact>.
9. Florida Statutes, § 509.233, http://www.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0509/SEC233.HTM&Title=-%3E2009-%3ECh0509%3ESection%20233#0509.233; Tennessee Code Annotated, Title 6, Chapter 54, Part 1 § 6-54-135, <http://www.michie.com/tennessee/lpext.dll?f=templates&fn=main-h.htm&cp=tncode>; Minnesota Statutes § 157.175, <https://www.revisor.mn.gov/statutes/?id=157.175>.
10. Tennessee Code Annotated, Title 6, Chapter 54, Part 1 § 6-54-135. It is true that the “come into contact” language is used, but in that context with inanimate dining objects such as dishes, it is more clear that the it means physical contact as compared with “coming into contact” with a human or pet. Still, it is by no means clear language, which is problematic especially when more direct language such as “physical contact” could easily be used. Furthermore, the Tennessee law only addresses dogs, which is a flaw.