

Iowa Department of Public Health Inquiry No. 5.

8/10/2008

Thomas Newton, Director
Iowa Department of Public Health
Lucas State Office Building
Des Moines, Iowa 50319-0075

Re: Definitions of “public place,” “grounds,” “entrance” and other terms; the extent of enforcement implied.

Director Newton,

As you are aware, the Iowa Department of Public Health adopted and filed rules to implement the Smoke-free Air Act of 2008, House File 2212, on June 27, 2008. The current enforcement rules are unclear to me as to total scope of the department’s enforcement intent, are often ambiguous and apparently contradictory, and in some cases appear to extend beyond the stated legislative intent and/or applicable material risk considerations. The absence of opportunity to make oral presentation before the department due to the emergency declaration under which the rules were adopted greatly adds to the difficulties encountered when attempting to clarify the enforcement rules. I find no legislative emergency declaration in my copy of Enrolled House File 2212.

For purposes of this discussion I refer to “secondhand smoke” as included to in the department’s rules by its proper identification as “Environmental Tobacco Smoke” (ETS), as reflected in language of House File 2212.

Background: The following House File 2212 and Iowa Department of Public Health quotations are provided for reference. My concerns are prompted by the current public controversy over which areas may or may not be exempt from the Iowa Department of Public Health’s current rules.

Section 1.2. of House File 2212 states: “The general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. Those findings are sufficient to warrant measures that regulate smoking in public places, places of employment, and outdoor areas in order to protect the public health and the health of employees.”

Section 1.3 of House File 2212 states: “The purposes of this chapter is to reduce the level of exposure by the general public and employees to environmental tobacco smoke in order to improve the public health of Iowans.”

Section 2.16. of House File 2212 states: “‘Public place’ means an enclosed area to which the public is invited or in which the public is permitted, including but not limited to all of the following:” (the section continues, to list items a. through v., which enumerate several types of public places such as bars, restaurants, etc.)

Section 2.19 of House File 2212 states: “Service Line” means an indoor line in which one or more individuals are waiting for or receiving service of any kind, whether or not the service involves the exchange of money.”

The Home Page for the department’s Iowa Smoke Free Air Act Internet site states: “Smoking will be regulated in public places, places of employment, and certain outdoor areas.

There is an apparent contradiction concerning the definition of a public place in House File 2212: a public place is defined as “. . .an enclosed area to which the public is invited . . .” (underline added) but the legislative findings extend the prohibition to outdoors. The language of Section 2.16 clearly refers to “public places” to which smoking prohibitions apply as being enclosed. The legislative purposes of HF 2212 “to reduce the level of exposure . . .” could be achieved in material measure by not extending prohibitions on smoking to outdoor areas.

The apparent contradictions raise an important question as to clarity of the department’s rules and scope of intended enforcement because some outdoor areas are exempt and others are not. For example, smoking in outdoor seating or serving areas of restaurants is prohibited under Section 3.2.b. of House File 2212, even though such areas are not enclosed. Restaurants are included in “public places” as defined by the statute in 2.16, yet no prohibition for smoking in outdoor areas of other “public places” as defined in 2.16 is specified in 3.2.b. Neither House File 2212 nor the department’s rules clarify this contradiction.

The contradictions and consequential confusion are amplified by an apparent distinction between public places and public buildings. There is no corresponding definition for public building in section 2.16 of House File 2212 or in the department’s rules. Since both are considered by House File 2212 to be “public,” enforcement hinges upon whether an establishment is a “place” or building.” In my layperson’s view, this creates a distinction without a material difference. This is important because smoking prohibitions for “public buildings” are very different than those for “public places.” For example, by HF 2212 definition, the smoking prohibitions for “public places” include enclosed areas, yet definitions in the department’s rules extend smoking prohibitions to include:

“Grounds of any public building means an outdoor area of a public building that is used in connection with the building, including but not limited to, a sidewalk immediately adjacent to the building; a patio; a deck; a curtilage or courtyard; a swimming or wading pool; or a beach, or any other outdoor area as designated by the person having custody or control of the public building.”

House File 2212 does not contain a similar definition for grounds of a public building that includes language such as patio, deck or courtyard. It appears to me that the definitions can apply to a patio or courtyard of any “public place” business location as they do to a building owned by the state. The rules do not include any statement or definition that distinguishes the definition of “building” as used for state owned facilities from application to “places” where private, non-state business is conducted.

Appearing to grant an exemption for a business group or certain locations on premises to garner political support to pass smoking bans and then take the exemption away because the ostensibly-exempt establishments are “places of employment” or by other definition(s) is a strategy that is often employed by tobacco control advocates. Considering that pattern of conduct I believe that careful attention to the wording of rules and definitions by interested parties or affected business owners is warranted.

In its definitions section the department’s rules define the term “infiltrate:”

“‘Infiltrate’ means to permeate an area where smoking is prohibited by passing through a wall, ceiling, floor, window, door, or ventilation system to the extent that and individual can smell secondhand smoke.”

I do not find a corresponding definition of “infiltrate” in Section 2. of House File 2212. The above definition does not specify the degree or extent to which an individual could “smell” Environmental Tobacco Smoke, whether faint or strong. Nor does the definition specify the proximity to a smoking area in which

the odor is detected. That definition is to my mind, unclear and allows for enforcement application in a most extreme manner.

In its ventilation Standard 62.1 2007 the American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) provides specifications for enclosed, separately-ventilated smoking rooms. To my understanding, there is no language in that standard that requires no odor of Environmental Tobacco Smoke be detected to any degree in any portion of a related or adjacent nonsmoking area. From 1994 to 2001 the federal Occupational Safety and Health Administration (OSHA) conducted its rulemaking process for Indoor Air Quality (IAQ) regulations, which included a nationwide smoking ban for indoor work environments. Those proposed Indoor Air Quality regulations did not include equivalent smoking prohibitions for outdoor areas. In its August 10, 2001 brief to the U.S. Court of Appeals for the District of Columbia OSHA concluded that the alleged risks from Environmental Tobacco Smoke (ETS) were not so egregious as to demand instant regulation. In a December 2001 press release OSHA announced that it had withdrawn its proposed IAQ regulations with the support of tobacco control advocates, including the American Cancer Society and American Lung Association. OSHA's proposed nationwide workplace smoking ban did not include a mere odor of ETS in its consideration of material health risk.

It appears to me that the Iowa Department of Public Health is applying a "Zero-Tolerance," deminimis risk policy to ETS, which is more extreme than the material risk standard that is statutorily applied by workplace occupational health and safety authorities. Deminimis risk analysis excludes consideration of economic impact and feasibility of proposed regulations required by a material risk standard. I am deeply concerned about the apparent substitution of standards by the department. In addition, based on the preceding information it is clear to me that the definition of "infiltrate" in the department's rules extends beyond any definition in House File 2212 and beyond ETS risk considerations by occupational safety and health authorities or ventilation standard associations.

Outdoor and indoor areas present different material risk health considerations due to concentration and dispersal of ETS, yet House File 2212 and the department's rules apply the same and exclusive blanket regulatory mandate to prohibit smoking in both locations. While House File 2212 does include both indoor and outdoor smoking prohibitions, as outlined above there are serious questions concerning apparently contradicting and conflicting parts. The issue of a blanket mandate for materially different locations is of concern to me in light of the regulatory analysis duties of the department, as set forth in section 17A.4A 2.a. of Iowa Code, which includes:

"(5) A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule."

"(6) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons they were rejected in favor of the proposed rule."

What is at issue is the degree of regulation required to carry out the legislative intent of HF 2212, "to protect the public health and the health of employees." The fact that the legislative intent includes the statement "measures that regulate smoking in public places, places of employment, and outdoor areas" does not imply that the same, exclusive remedial measure of a total prohibition must be broadly applied. Clearly, the same remedial measures to protect public health are not required in a small enclosed place of business and on a driveway as included in the department's definition of "entrance."

Questions: Based on the forgoing and my layperson's understanding I ask the following questions:

1. What regulatory analysis, including consideration of different material risks arising from exposure to ETS in indoor and outdoor areas, has the Iowa Department of Public Health conducted in drafting its enforcement rules for the Smoke Free Air Act?
2. What inquiries of the legislature has the Iowa Department of Public Health made to clarify the above apparent conflicts and contradictions in House File 2212?
3. Why are some outdoor areas exempt from smoking prohibitions and others not exempt?
4. Does the Iowa Department of Public Health consider patrons and smoking on an outdoor deck or patio of a bar, bowling center, retail store or other establishment that is not a restaurant to be exempt from the smoking prohibition?
5. Does the Iowa Department of Public Health consider patrons and smoking in an outdoor service line of a bar, retail store or other establishment that is not a restaurant to be exempt from the smoking prohibition?
6. Do smoking prohibitions as applied to the grounds of a “public building” owned or operated by state or local government apply to the grounds of “public places,” such as a bar, bowling center, or other privately owned business?
7. What section in House File 2212 provides authority for the Iowa Department of Health to establish the standard that tobacco smoke cannot “infiltrate” “to the extent than an individual can smell secondhand smoke”?
8. What credible information establishes the regulatory fact that the mere odor of environmental tobacco smoke poses a threat to public health within the meaning of the legislative intent and purposes of HF 2212?

Finally, please note that this inquiry has been sent by both U.S. Mail and through the health department’s Web form. I request a response by both E-Mail and letter from the health department.

Respectfully,

Marilea David
Director
Iowans for Equal Rights