

Bonnie E. Mapes, Director
Division of Tobacco Use Prevention and Control
Iowa Department of Public Health
Lucas State Office Building
321 E. 12th Street
Des Moines, Iowa 50319

Re: Your Response to Eight Letters from Iowans for Equal Rights

Director Mapes,

I received your letter dated November 24, 2008 on December 3, 2008. Please note that I include the full text of your two letters – one to me and one to Mr. Coates of the same date – with my below comments. To date, you have responded to my two letters sent in early August and one from Mr. Coates to the Iowa Department of Public Health on or about the same date. There are two letters from Mr. Stanford, two letters from Mr. Shanno, and one letter from Mr. Coates that to our knowledge have not yet been responded to. While members of the Board of Directors of Iowans for Equal Rights appreciate your responses to myself and to Mr. Coates, it is important to note that there are still five of eight letters that have not been responded to as of today's mail.

Since the letters to the health department from Mr. Stanford and Mr. Shanno include important questions concerning Smokefree Air Act enforcement rule content, as well as matters that address genuine indoor air quality and smoking bans, it is also clear that several substantive and material issues concerning the rules have yet to be addressed. Accordingly, it is the position of Iowan's for Equal Rights' board that communications with our organization concerning the health department's current enforcement rules is incomplete as to both the total scope of letters sent by the board and as to the substance of the matters addressed in our letters.

Iowans for Equal Rights board members would be pleased to provide any assistance that the health department may require to complete responses to all questions raised in our previous communications. It is of concern to our board that it appears the department may be cherry picking questions it chooses to answer at this late date, now about four months after our letters were initially sent. Be assured that our inquiries are in earnest and that they address subjects that we consider to be highly relevant to both the rule making process employed and the substance of the health department's enforcement rules.

You mention in the second paragraph of your letters to myself and Mr. Coates that “. . . the Department was advised by the Attorney General's office Iowa Code governing the rules process states that the public comment period is not intended to be a debate session . . .” We would, of course, defer to Attorney General Miller's interpretation of Iowa law. It is, however, our strong belief that your letter and the previous quote omit an important consideration: under ordinary, non-emergency rulemaking procedures the public comment period would be preceded by state agency hearings that allow interested parties to express their views and concerns and to properly influence rules content by and through their testimony and submissions. In addition, our layperson's view is that under ordinary, non-emergency rulemaking procedures as set forth in the Iowa Administrative Procedure Act the opportunity for interested parties to request oral presentation is provided and that state agencies have a statutory duty to “consider fully” the content of oral presentation submissions by interested parties.

As I am certain you are aware, the current emergency rule making procedure adopted by the Iowa Board of Health and the Iowa Department of Public Health on June 27, 2008 precludes public hearings and opportunity for oral presentation for which the participants' submissions must be “considered fully.” One letter from Mr. Coates to the health department that was sent in early August explicitly addresses the subject of rule adoption pursuant to emergency provisions. That letter included four questions concerning the effect of rule adoption pursuant to emergency. Your response to Mr. Coates omits any reference to those four questions and exclusively replies to three questions raised in his letter concerning the imbalance of risk and additional costs that may be assessed against small business owners.

In light of the foregoing, with the exception of a few comments below we are unable to comment further until the health department has fully completed its reply to all questions raised in our previous communications. The few comments that we provide concerning the content of your replies to date are as follows:

1. Concerning his inquiry about enforcement penalties, in your response to Mr. Coates you state, “The statute does not differentiate between businesses according to their size.” That response evades the subject of the question, which was the public health basis for the penalties assessed for small business owners. Your response to Mr. Coates appears to evade the important issue of genuine public health considerations that compel what can only be described as draconian penalties, while failing to state the basis for such penalties. Absent an authoritative basis for penalties we question the severity of those imposed on small business owners by the department’s rules.

2. In your response to Mr. Coates you state, “There is no formula for in the code for calculating . . .” the amount of costs that the health department may take. This amounts to a blank check being issued to the health department without any criteria or restriction being placed on reasonable or unreasonable amounts the health department may unilaterally choose to assess. When coupled with apparent anonymous complaints that blank check is particularly onerous.

3. In your reply to me concerning the mere presence of an odor of tobacco smoke you state, “The Smokefree Air Act does not define infiltration,” and “. . . does not specify levels of exposure.” Yet, it appears that absent such definition the health department rules impose remedial action, including that to abate a “public nuisance,” can be undertaken based on a mere odor. Your response evades the critically important issue of a new standard being interjected by the health department and which admittedly goes beyond the authority granted in the Smoke Free Air Act.

4. In your reply to me concerning which outdoor areas are exempt you state, “This determination was not (and cannot be) made by the Department.” Yet, the ambiguous and often misleading language of the current enforcement rules makes it absolutely clear to Iowans for Equal Rights board members that the department has drafted rules that can and will expand enforcement actions to outdoor areas such as bar patios that are not specified as subject to the Act by the legislature.

There are several additional comments concerning your replies to date that would be appropriate. However, suffice it to say that we believe the apparent evasions and contradictions referred to above are sufficient to establish a strong basis for objection as to both the substance of the current rules and procedure by which they are adopted.

Accordingly, the Board of Directors of Iowans for Equal Rights urges the Administrative Rules Review Committee to not vote approval of the current rules. It is the hope and belief of our board that a more dispassionate review of the source legislation, House File 2212, and the health department’s enforcement rules during the forthcoming General Assembly will provide the statutory basis for more appropriate rules.

Respectfully,

Marilea David, Director
Iowans for Equal Rights
On behalf of Its Board of Directors
2515 Countryside Place
West Des Moines, Iowa 50265



Iowa Department of Public Health
Promoting and Protecting the Health of Iowans

Thomas Newton, MPP, REHS
Director

Chester J. Culver
Governor

Patty Judge
Lt. Governor

November 24, 2008

Marilea David
2515 Countryside Place
West Des Moines, IA 50265

Dear Ms. David:

Following are responses to questions you submitted in writing related to the Iowa Smokefree Air Act and the Administrative Rules implementing the Act.

As you are aware, the Department was advised by the Attorney General's office that Iowa Code governing the rules process states that the public comment period "is not intended to be a debate session but rather an opportunity for the public to submit comments." As such, it is not the practice of the Department to respond to public comments received as part of the Administrative Rules process. Now that the process of receiving, reviewing, and disseminating the comments has been completed, we are responding to your comments.

You sent two letters on the same date, and I have included responses to both letters below.

Letter One

1. Considering the above-described cultural, political, and economic environments as described above, by what standard can any persons who smokes or any small business owner conclude that the Iowa smoking ban rules are fair or that the department's enforcement will be even-handed?"

A. The enforcement process in the Administrative Rules is subject to public review and comment and must be reviewed and approved by both the Board of Health and Administrative Rules Review Committee.

Members of the Tobacco Use Prevention and Control Commission are appointed by the Governor to provide oversight of the Department's Tobacco Use Prevention and Control Division. (The Department is not a member of the Commission.) The Commission has no role in drafting, reviewing or approving the rules and has no role in the enforcement process.

2. How did the environments as described above influence the department's decision to exclude separately ventilated smoking rooms from permissible compliance alternatives in it enforcement rules.

A. The Smokefree Air Act as it was passed by the Legislature does not allow for separately ventilated smoking rooms, therefore, the Department could not consider such an option in the Administrative Rules. To do so would have been a violation of the law.

3. Why should any small business owner in Iowa lose one dime of revenue or experience any administrative burden to support an advocacy scheme directed toward promoting sales of pharmaceutical nicotine or other commercial smoking cessation products?

A. It is the stated opinion of the questioner that the Smokefree Air Act is a "scheme" to promote sales of smoking cessation products, specifically products manufactured by Johnson & Johnson.

Neither the Legislature nor the Department of Public Health promote the sale of cessation products.

Letter 2

1. What regulatory analysis, including different material risks arising from exposure to ETS in indoor and outdoor areas, has the Iowa Department Public Health conducted in drafting its enforcement rules for the Smokefree Air Act?

A. Administrative Rules are adopted to implement the law as it was passed by the Legislature. The Legislature made the following determination in its findings for the Smokefree Air Act:

Section 1. NEW SECTION. 142D.1 TITLE == FINDINGS ==
1 10 PURPOSE.

This chapter shall be known and may be cited as the "Smokefree Air Act". The general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. These 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. The purpose 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.

It was the task of the Department of Public Health to draft rules to support the stated purpose of the legislation, not to research the findings of the Legislature that environmental tobacco smoke poses a hazard to public health.

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?

A. Numerous inquiries were made of the bill sponsors and other legislators by Department staff and staff from the Attorney General's office during the process of drafting the rules.

The Administrative Rules can clarify and further define stipulations of the law, but changes to stipulations of the law cannot be made within the Rules. For example, in your letter you state concern over "which areas may or may not be exempt from the Iowa Department of Public Health's current rules and then go on to list several sections of HF 2212, not sections of the Rules, as your areas of concern. The Rules cannot make changes to these sections stipulated in HF 2212.

There is no conflict in the law between a public place and a public building. "Public buildings" are a specific category of public place. The law characterizes a public building as a building:

5 27 ". . . owned, leased, or
5 28 operated by or under the control of the state government or
5 29 its political subdivisions and including the entirety of the
5 30 private residence of any state employee any portion of which
5 31 is open to the public.

3. Why are some outdoor areas exempt from smoking prohibitions and others not exempt?

A. The decision of which outdoor areas are required to be smoke-free and which are not was made by the Legislature when it passed the Smokefree Air Act. This determination was not (and cannot be) made by the Department.

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.

A. The determination of in which outdoor areas smoking is to be prohibited was made by the Legislature, not by the Department of Public Health.

The Smokefree Air Act states that smoking is prohibited in the outdoor seating or service area of a restaurant. It also states that smoking is not prohibited in the outdoor seating or service area of a bar. In general, smoking would not be prohibited by the law on the outdoor deck or patio of a bowling center or retail store or other establishment which is not a food service establishment. However, if that outdoor patio were the designated seating area for an entertainment or sports event, then smoking would be prohibited.

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?

A. The law does not prohibit smoking in outdoor service lines, unless that service line is in an outdoor area in which smoking is otherwise prohibited.

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?

A. Since privately-owned businesses such as bars or bowling centers are not owned or operated by state or local government, they are not considered by the law to be public buildings and, as such, would not be subject to the prohibition of smoking on the grounds of public buildings.

7. What section in House File 2212 provides authority for the Iowa Department of Public Health to establish the standard that tobacco smoke cannot "infiltrate" to the extent that an individual can smell secondhand smoke?

A. The Smokefree Air Act provides no definition of "infiltration." The purpose of Administrative Rules is to clarify and further define stipulations of the law in order for the law to be implemented. Since the Department was given responsibility by the Legislature for drafting the Administrative Rules for the Act, it was the Department's responsibility to provide a definition of the term "infiltration."

8. What credible information establishes the 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?

Odor is used as an indicator that environmental tobacco smoke is present in a location. It is not a measure of exposure. The Smokefree Air Act prohibits "infiltration" of tobacco smoke under specific circumstances. It does not specify levels of exposure.

Please feel free to contact me if you have further questions concerning the Smokefree Air Act or the Administrative Rules.

Sincerely,



Bonnie E. Mapes

Director, Division of Tobacco Use Prevention and Control



Iowa Department of Public Health
Promoting and Protecting the Health of Iowans

Thomas Newton, MPP, REHS
Director

Chester J. Culver
Governor

Patty Judge
Lt. Governor

November 24, 2008

Tom Coates
1515 E. 17th Street
Norwalk, Iowa 50211

Dear Mr. Coates,

Following are responses to questions you submitted in writing related to the Iowa Smokefree Air Act and the Administrative Rules implementing the Act.

As you are aware, the Department was advised by the Attorney General's office that Iowa Code governing the rules process states that the public comment period "is not intended to be a debate session but rather an opportunity for the public to submit comments." As such, it is not the practice of the Department to respond to public comments received as part of the Administrative Rules process. Now that the process of receiving, reviewing, and disseminating the comments has been completed, we are responding to your comments.

Q1. What is the public health or other basis that compels such enforcement penalties against small business owners in Iowa?

- A. The Legislature made the following determination about public health in its findings for the Smokefree Air Act:

Section 1. NEW SECTION. 142D.1 TITLE == FINDINGS ==
1 10 PURPOSE.

This chapter shall be known and may be cited as the "Smokefree Air Act". The general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. These 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. The purpose 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.

The penalties for not complying with the requirements of the Smokefree Air Act are stipulated in the statute. The statute does not differentiate between businesses according to their size.

Q2. Why do the Iowa Department of Public Health Rules adopted June 27, 2008 not require that the person committing the unlawful act of smoking in a public place be identified and cited for a complaint to will be [sic] and considered in the cumulative record of an Iowa small business owner?

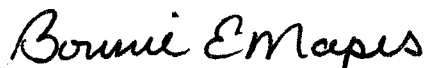
- A. Law enforcement officers have the authority to issue civil citations to individuals who violate the Smokefree Air Act. As with any other law, officers have discretion as to how they exercise their authority. The Department of Public Health does not have the authority to require that state and local law enforcement officers cite every individual they observe smoking in areas where smoking is prohibited. The Department also does not have the authority to require that all citations to individuals by local law enforcement officers be reported to the Department.

Q3. What is the formula that is to be applied against Iowa small business owners by the Iowa Department of public Health in calculating the amount due for “abating the public nuisance” that is “may take action to recover the costs of such abatement?”

- A. There is no formula in code for calculating this amount.

Please feel free to contact me if you have further questions concerning the Smokefree Air Act or the Administrative Rules.

Sincerely,



Bonnie E. Mapes

Director, Division of Tobacco Use Prevention and Control