Reconsidering the Nevada Clean Indoor Air Act

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Introduction

The 2009 Nevada legislative session will not be remembered for any major gaming-related statutory amendments or additions. During the 2009 legislative session, members of the Nevada Legislature were primarily focused upon providing the State with adequate funding to keep the government and its varied resources and programs afloat and operational. As the legislative session slogged on, the State faced a worsening budget shortfall. Due to this budget shortfall, the Nevada Legislature enacted a tax hike of almost $1 billion, with such tax hike comprised primarily of voter-approved higher hotel room taxes.

Despite the Nevada Legislature's focus on budget issues, some gaming-related Senate and Assembly bills were enacted and signed into law, while others were thoroughly discussed and considered by the Nevada Legislature. The two main gaming-related bills were Senate Bill 83 and Assembly Bill 218. These bills are discussed in detail in the “2009 Nevada Gaming Legislation” article on page 6 of this issue of the Nevada Gaming Lawyer.

Competing Ballot Initiatives in 2006

Before delving into SB 372’s proposed amendments to the Clean Air Act, it is helpful to provide a brief history of the enactment and implementation of the Clean Air Act. In November 2006, Nevada voters approved State Question No. 5 - Clean Indoor Air Act Initiative Petition (“Question 5”). The stated purpose behind Question 5 was to protect “children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos.” A similar ballot initiative, however, failed at the polls as voters rejected State Question No. 4 - Responsibly Protect Nevadans from Second-Hand Smoke Act (“Question 4”).

Question 5, which ultimately became Nev. Rev. Stat. 202.2483, prohibits smoking tobacco in any form “within indoor places of employment including, but not limited to, the following: (a) Child care facilities; (b) Movie theatres; (c) Video arcades; (d) Government buildings and public places; (e) Malls and retail establishments; (f) All areas of grocery stores; and (g) All indoor areas within restaurants.” The Clean Air Act allows smoking in (a) Locations "within casinos where loitering by minors is prohibited . . . (b) Stand-alone bars, taverns, and saloons; (c) Strip clubs or brothels; (d) Retail tobacco stores; and (e) Private residences . . . ."

While the first two sections of the Clean Air Act appear to allow for smoking in taverns and bars, the defined terms in Question 5 provide otherwise. The Clean Air Act defines a casino as “an entity that contains a building or large room devoted to gambling games or wagering on a variety of events [and a casino] must possess a nonrestricted gaming license . . . . and typically uses the word ‘casino’ as part of its proper name.” A "stand-alone bar,
tavern, or saloon” is “an establishment devoted primarily to the sale of alcoholic beverages to be consumed on the premises, in which food service is incidental to its operation, and provided that smoke from such establishments does not infiltrate into areas where smoking is prohibited under the provisions of this section . . .” In order for food service to be incidental to the operation, the food served must be “prepackaged food items including, but not limited to peanuts, popcorn, chips, pretzels or any other incidental food items that are exempt from food licensing requirements . . .” Stand-alone bars, taverns, or saloons also must either be housed in a “physically independent building that does not share a common entryway or indoor area with a restaurant, public place or any other indoor workplaces where smoking is prohibited by this section” or in a “completely enclosed area of a larger structure, such as a strip mall or an airport, provided that indoor windows must remain shut at all times and doors must remain closed when not actively in use.” The defined terms in Question 5 provide that food preparation and service in a tavern must take place in a “completely enclosed area of a larger structure” and that the bar area must not “share [an] indoor area with a restaurant.”

Question 4, on the other hand, was a bit more favorable in its provisions pertaining to taverns and bars than Question 5. If it had been passed, Question 4 would have prohibited smoking in “Indoor dining areas within restaurants; . . . Grocery dining areas . . .” Among other places. Question 4 would have permitted smoking in “Facilities with non-restricted gaming licenses; Bars, taverns and saloons; . . . Areas within restaurants where persons under the age of 21 years are not permitted; . . . [and] Any area within a business that is leased to or operated by a person who is licensed pursuant to [the Nevada Gaming Control Act], including, but not limited to, areas within retail establishments, grocery stores, drug stores and convenience stores.”

When faced with a decision between Questions 4 and 5 in November 2006, Nevada voters passed Question 5 with over 54 percent of the vote and the Clean Air Act became effective on December 8, 2006.

Lawsuit Challenging Constitutionality of Clean Air Act

Prior to the Clean Air Act going into effect, assorted tavern owners and associated groups filed a complaint in Clark County District Court challenging the constitutionality of the voter-approved Clean Air Act. Some of the plaintiffs involved in the constitutional challenge were the Nevada Tavern Owners Association (“NTOA”), the owners and operators of the various PT’s and Village Pubs located in Southern Nevada, and the subsidiary of Herbst Gaming, Inc. (“Herbst Gaming”) responsible for the largest slot route operation in Nevada. At a December 7, 2006 hearing, District Court Judge Douglas W. Herndon issued a temporary restraining order to prevent the implementation and enforcement of the Clean Air Act and set a preliminary injunction hearing for December 19, 2006.
Following the hearing on December 19, 2006, Judge Herndon issued an oral ruling on December 21, 2006 and entered an order on January 11, 2007. In response to Plaintiffs’ arguments that the Clean Air Act contained numerous terms that were imprecisely vague and/or incomplete, that the criminal enforcement standards of the Clean Air Act were imprecisely vague, that the absence of a scienter clause in the Clean Air Act rendered its vagueness incurable, and that the vagueness of the Clean Air Act, when coupled with the absence of a scienter element, encouraged arbitrary and discriminatory enforcement, Judge Herndon ordered that the various law enforcement agencies tasked with enforcing the Clean Air Act be restrained and prohibited from any criminal enforcement of the Clean Air Act. Judge Herndon, however, ruled that civil enforcement of the Clean Air Act would be allowed. Following some additional hearings in January 2007, the NTOA appealed the District Court decision to the Nevada Supreme Court. Oral argument related to the appeal occurred on April 7, 2009. No decision has been issued by the Supreme Court as of June 30, 2009.

Compliance with and Enforcement of Clean Air Act

Following the preliminary injunction hearing in December 2009, assorted businesses in Nevada were faced with the task of determining how to operate their businesses in compliance with the Clean Air Act. In an effort to provide guidance to the public, employers, and businesses, the Southern Nevada Health District (“Health District”) published and posted assorted guidelines on its website regarding the Clean Air Act. In its “Guide for the General Public,” in response to the question, “If an establishment allows me to smoke inside, am I still breaking the law?” the Health District advises that, “Even if an establishment allows you to smoke in an area where smoking is prohibited, you are violating the [Clean Air Act] and may be subject to any applicable penalties.” In an effort to provide guidance to restaurants and bars, the Health District guidelines note that for combination restaurants and bars that want to continue to allow smoking, in order for the bar to be completely enclosed, “it must be enclosed on all sides by any combination of solid walls, windows or doors that extend from the floor to the ceiling.” Additionally, the Health District advises employers to “post conspicuous ‘No Smoking’ signs at every entrance” and “to remove all ashtrays and other smoking paraphernalia from their smoke-free facilities.”

Following the enactment of the Clean Air Act, numerous taverns were forced to remodel the interior space of their establishments in order to comply with the Clean Air Act. Plexiglas enclosures separating the bar and gaming area from the restaurant portion of taverns became a common sight for tavern patrons.

Due to Judge Herndon’s ruling removing criminal penalties from the Clean Air Act, the Health District was tasked with sole enforcement responsibility in Southern Nevada. In an effort to ensure compliance with the Clean Air Act, the Health District drafted a citation for health inspectors to use when citing individuals found smoking at locations covered by the smoking ban. In a well-publicized instance regarding enforcement of the Clean Air Act, Lawrence Sands, District Health Officer of Clark County, filed suit against the operator of Bilbo’s Bar & Grill in Las Vegas for its failure to comply with the Clean Air Act. After Clark County District Court Judge Valerie Adair issued an order granting Dr. Sands’ motion for a preliminary injunction requiring Bilbo’s to remove ashtrays and smoking paraphernalia from areas where smoking is prohibited by the Clean Air Act, Dr. Sands filed another motion asking Judge Adair to order Bilbo’s employees and representatives to restrain from
smoking tobacco in areas of the restaurant where smoking is prohibited and to be ‘affirmatively ordered to verbally advise’ restaurant patrons that they cannot smoke in the business.” The dispute between the Health District and Bilbo’s centered on whether Bilbo’s employees had an affirmative duty to inform people that they could not smoke.” The dispute between the Health District and Bilbo’s is ongoing with a trial date set in March 2010.

The Health District also filed a lawsuit against Eminence Enterprises, operators of Irene’s Lounge in Las Vegas, because Irene’s Lounge employees were serving food to bar patrons which was a violation of the Clean Air Act as customers must order and bring food back to the bar themselves.”

**Proposed Amendment to the Clean Air Act**

Ever since December 2006 when the Clean Air Act became effective, citizens of Nevada have likely noticed significant changes to the interior of their favorite tavern or have noticed that fewer people are sitting in front of slot machines at their local grocery store or convenience store. Despite some of the issues related to the enforcement of the Clean Air Act detailed above, the Clean Air Act has appeared to limit individuals’ exposure to secondhand smoke in restaurants, taverns, grocery stores, gas stations, and convenience stores. This is likely attributable to the fact that gaming revenues at assorted taverns, restaurants, bars, and convenience stores has plummeted since the passage of the Clean Air Act.

When asked about SB 372, which was proposed to amend the Clean Air Act, Bob Ansara, the owner of Ricardo’s Mexican Restaurant in Las Vegas, noted that since the passage of the Clean Air Act there have been “too many empty chairs inside his restaurant’s bar.” Herbst Gaming’s subsidiary company E-T-T, Inc., which is the largest slot route operator in Nevada, has encountered a significant decline in revenue following the passage of the Clean Air Act. In its Form 10-K filed with the Securities and Exchange Commission (“SEC”) on March 31, 2009, Herbst Gaming documented a substantial decrease in its slot route operation business, as slot revenue was “$276.9 million for the year ended December 31, 2007, a decrease of $70.1 million, or 20%, from $347.0 million for the year ended December 31, 2006.” Another Herbst Gaming SEC filing noted that the adoption of the Clean Air Act “led to significant decreased patron play” at its route locations and that if the company was not able to “offset such decreased patron play, or such patron play continues to decrease, there may be a material adverse effect on [its] business, financial condition and results of operation.”

The Nevada Constitution sets forth a three year requirement before a statute enacted pursuant to a voter initiative petition may be amended.” Therefore, the 2009 legislative session was the first time that a possible amendment to the Clean Air Act could be addressed by the Nevada Legislature as the statute was not subject to legislative amendment or repeal unless the legislative enactment provided for an effective date after December 8, 2009.

SB 372 was introduced in an attempt to amend the Clean Air Act but it was not approved and enacted. The key provision of SB 372 was the inclusion in the Clean Air Act of a category of “adult stand-alone bars, taverns and saloons” as locations where smoking would be permitted. As defined in SB 372, an “adult stand-alone bar, tavern or saloon” is “an establishment that, in addition to giving, serving or offering for sale food: (1) Is licensed pursuant to any applicable local ordinance to sell alcoholic beverages to be consumed on the premises; (2) Holds a nonrestricted licensed as
Counsel of Herbst Gaming, noted that as a result of the Clean Air Act, his company “lost 18 percent of [its] revenues from [the] slot route operation and 62 percent of its earnings before interest, taxes, depreciation, and amortization.” Mr. Higgins unequivocally stated that the Clean Air Act was responsible for these economic losses. After renegotiating its contractual rental payments with assorted grocery and drug stores, fifteen of Herbst Gaming’s grocery store partners closed. Over thirty tavern locations at which Herbst Gaming provided slot route services have closed.

Steve Arcana, the Chief Operating Officer of Golden Gaming, Inc., provided data illustrating similarly dismal economic numbers: PT’s locations suffered a 28.2 percent decline within the first two months of the smoking ban. Joseph Wilcock of the NTOA stated that following the implementation of the Clean Air Act, the typical NTOA member experienced a decline in gaming revenue of 14 percent, a decline in food revenue of 30 percent, and a decline in bar revenue of 15 percent. Additionally, most NTOA locations had to lay off between 3 to 4 employees on average.

The Senate Committee on Judiciary heard from assorted supporters of the Clean Air Act who strongly opposed any amendment to the voter-approved initiative. Michael Hackett and Robert Eisenberg spoke on behalf of the American Cancer

Defined in NRS 463.0177 or a restricted license as defined in NRS 463.0189; and (3) Prohibits at all times persons who are under 21 years of age from entering the premises.” The idea behind this provision of SB 372 was to allow for food service inside a bar that holds a restricted gaming license. Additionally, SB 372 contained provisions that would permit individuals to smoke tobacco inside a convention facility hosting a trade show if the trade show: “(1) Is not open to the public; (2) Is being produced or organized by a business relating to tobacco or a professional association for convenience stores; and (3) Involves the display of tobacco products.”

In discussing the proposed amendments to the Clean Air Act contained in SB 372 before the Senate Committee on Judiciary, Michael G. Alonso, a lobbyist representing Herbst Gaming, noted that the “adult stand-alone bar” classification meant that adults could smoke in a location at which no children are allowed so that the proposed bill would protect children and would make enforcement easier.” James L. Wadham, representing Golden Gaming, Inc., echoed Mr. Alonso’s sentiments and noted that SB 372, if enacted, would fulfill the purpose of the Clean Air Act in that children would be protected from secondhand smoke because children would be prohibited from going into smoking areas, while adults could enter the “adult-only locations, where people can make their own choices about smoking, gambling, eating and drinking.”

Substantial testimony was provided to the Senate Committee on Judiciary on April 3, 2009 regarding the economic impact of the Clean Air Act. Sean Higgins, Executive Vice President and General
Society, while Dr. Mary A. Anderson spoke on behalf of the Washoe County Health District. The individuals opposed to amending the Clean Air Act primarily spoke about the important role the voter-supported initiative played in protecting Nevadans from secondhand smoke.”

Despite the economic implications of the Clean Air Act and the intense debate surrounding the provision, SB 372 was not moved upon in a timely fashion by the legislature and the key components of the proposed legislation were not passed. Ultimately, the provision in SB 372 that permitted the smoking of tobacco at a convention facility during a tobacco convention was enacted as part of AB 309, a bill that primarily dealt with increasing the criminal penalties for stalking offenses.”

Given the likely continued enforcement issues surrounding the Clean Air Act and the fact that additional economic data will be available to present to the 2011 Nevada Legislature related to the Clean Air Act’s impact on the Nevada tavern and slot route industries, there is a strong chance that another bill amending the Clean Air Act will be addressed by the Nevada Legislature in the next legislative session.


3 Id. at 202.2483(3)(a)-(e).

4 Id. at 202.2483(9)(a).

5 Id. at 202.2483(9)(m).

6 Id. at 202.2483(9)(f).

7 Id. at 202.2483(9)(m)(1)-(2).

8 See Full Text of “State Question No. 4 - Responsibly Protect Nevadans from Second-Hand Smoke Act” at Sec. 2.1 available at http://www.accessclarkcounty.com/Election/2006/GEN/St_Quest_4_FULLTEXT.pdf (last visited June 30, 2009).

9 Id. at Sec. 2.2.


11 For the sake of full disclosure, the author of this article worked at Kummer Kaeumper Bonner Renshaw & Ferrario ("KKBRF") from August 2005 through May 2009. Former KKBRF attorneys Mark Ferrario and Tami Cowden represented the Nevada Tavern Owners Association in the litigation challenging the Clean Air Act.


13 Id.


Id.


Id.


Id.

Id.


NV Const, Art. 19, Sec. 2(3).


Id. at Sec. 1(3)(f), p. 2.


Id. at p. 5.

Id. at p. 13.

Id.

Id.

Id. at p. 14.

Id.

Id. at p. 17.

Id.

Id. at p. 37.


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