



NEW JERSEY REGISTER
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MONDAY, OCTOBER 15, 2007
RULE ADOPTION
HEALTH AND SENIOR SERVICES
THE COMMISSIONER
SMOKE-FREE AIR RULES

Registration: Cigar Bars and Cigar Lounges

Local Health Agency Conferral with Permit Entity; Access for Inspection

Local Health Agency Conferral with Permit Entity as to Changes Since Initial Registration

Tobacco Retail Establishment

Local Health Agency Right of Access for Inspection

Adopted Amendments: [N.J.A.C. 8:6-3.2](#) and 3.5

Adopted New Rule: [N.J.A.C. 8:6-4.3](#)

Proposed: June 4, 2007 at 39 N.J.R. 2182(a).

Adopted: August 20, 2007 by Fred M. Jacobs, M.D., J.D., Commissioner, Department of Health and Senior Services.

Filed: September 20, 2007 as R.2007 d.320, without change.

Authority: [N.J.S.A. 26:1A-15](#) and 16 through 19, and [26:3D-55](#) et seq., particularly 26:3D-64.

Effective Date: October 15, 2007.

Expiration Date: May 21, 2012.

Summary of Public Comments and Agency Responses:

The Department of Health and Senior Services (Department) received comments from the following:

1. Ms. Rachelle Al Jobeh, Merchantville, NJ;
2. Jorge Luis Armenteros, President and Founder, A Little Taste of Cuba Certified Tobacconists, Princeton, NJ and New Hope, PA;

3. Kevin G. Sumner, President, **New Jersey** Health Officers Association, Sparta, NJ; and

4. Dr. Burton A. Weiss, Turnersville, NJ.

Quoted, summarized, and/or paraphrased below, are the comments and the Department's responses. The numbers in parentheses following the comments below correspond to the commenter numbers above.

1. COMMENT: The proposed amendments "would authorize local" health agencies "to inspect entities claiming the tobacco retail, cigar bar, or cigar lounge exemption, to hire accountants, architects, [and/or] engineers for the inspection, [and] assess the costs to the applicant.

The **New Jersey** Legislature in enacting the Smoke-Free Air Act used the language 'at no cost to the applicant' referring to establishments filing for the exemption." (1, 2 and 4)

"In this state the tobacco businesses have already lost a large portion of revenue to out-of-state mail-order, internet, and merchants in surrounding areas due to the 30 percent wholesale tobacco tax which is in place now. Adding charges to those filing for exemption ... violates the intent of the Legislature" (1 and 2) and "is tantamount to prohibiting exemptions." (2)

"The problem is that the local [health agencies], unlike fire departments and building inspectors, do not possess the expertise to inspect facilities and records. That problem is solved by the Notice of Claim of Exemption form, which requires the notarized statement of conformation from a NJ CPA accountant and, if required, a notarized statement from a NJ license architect or engineer. Thus, the needed information is already in the possession of the local [health agencies]. To now require additional review by accountants and architects or engineers hired by local [health agencies] would be redundant and incur unnecessary and considerable expense to the exempt establishments. Therefore, these rules should not be adopted." (1 and 2)

"The intent was to not increase the already onerous financial burden on tobacco businesses which pay a 30 percent wholesale tobacco tax. The Notice of Claim of Exemption form already requires the notarized statement of conformation from a NJ CPA and, if required, a notarized statement from a NJ licensed architect or engineer. Consequently, the information is already in the possession of the local [health agencies]. Requiring additional review by outside service providers would be redundant and financially burdensome on businesses already in compliance. I hope that logic prevails and these new rules be dismissed." (4)

RESPONSE: The commenters are incorrect in their restatement of the effect of the proposed amendments. As stated in the proposal Summary, existing [N.J.A.C. 8:6-3.2](#) and 3.4 already authorize local health agencies processing applications to register cigar bars and cigar lounges to inspect applicants' premises and financial records to evaluate the accuracy of representation applicants make in" support of exemption claims. See 39 N.J.R. 2182(a), June 4, 2007. The proposed new rule at [N.J.A.C. 8:6-4.3](#) would

"authorize local health agencies to conduct inspections of putative 'tobacco retail establishments,' to ascertain whether an entity claiming the exemption for 'tobacco retail establishments' is eligible to receive the exemption. This right of access for inspection is similar to the inspections [N.J.A.C. 8:6-3.2](#) and 3.4 authorize them to conduct with respect to putative cigar bars and cigar lounges." Id. Thus, the proposed new rule at [N.J.A.C. 8:6-4.3](#) would align the procedure for claiming the tobacco retail establishment exemption with the procedure already established for cigar bars and cigar lounges, with respect to the right of inspection to ensure compliance with the Act.

This right of inspection of premises by local health agencies stems from the broad powers of the Commissioner of the Department to inspect premises to enforce the health laws of the State. See [N.J.S.A. 26:1A-15](#), 16, 17, 18, 20, 23, 24, and 25.

The proposed new rule would not require local health agencies to conduct an inspection or to retain experts to assist them in their review of an exemption claim supported by the sworn statements of licensed accountants, engineers, and/or architects. Rather, the proposed new rule would articulate their discretionary authority to inspect premises, which authority probably exists even if the Department were to establish no express rule to this effect, by virtue of the powers of inspection local health agencies derive from the Commissioner's powers articulated in the laws cited above.

The commenters are correct in noting that local health officials examining an exemption claim may not have expertise in matters of accounting, ventilation, or structural engineering, which are relevant to an exemption claim. To fulfill their responsibilities to enforce the public health laws of the State, local health officials may elect to retain professionals to assist them in their examination of the financial documentation and/or physical premises underlying an establishment's exemption claim.

The Department has learned that some entities claiming exemptions may be making errors in claiming exemptions. For example, the Department has learned that an entity has attempted to count fees for "membership" in the entity's establishment toward the minimum sales of "tobacco products" necessary to claim an exemption the Act establishes. An exemption claim founded on this financial basis would be improper, even if a claimant's CPA executed the applicable form in good faith, but with a misunderstanding of the definitions of terms the Act uses to establish the exemption. (To prevent this from occurring, the Department printed relevant definitions on the applicable forms.) Thus, a local health agency's decision to examine financial records and structural conditions underlying an exemption claim may be appropriate and warranted to ensure that a claimed exemption is properly available to the applicant, and would be neither a redundant nor an illogical exercise.

If a local health agency or a municipality determines to assess inspection costs on claimants of the tobacco retail establishment exemption, the commenter is correct that it may be financially burdensome to claimants. Establishment owners would have to take into consideration the financial expense in determining whether to claim the exemption. If a tobacco retail establishment were to determine not to claim the exemption, it would not preclude the

establishment from continuing to operate and sell merchandise. It would only preclude customers from consuming on-site the retail merchandise they purchase. This may impede prepurchase sampling of products, but would otherwise be consistent with the notion of retail stores being locations for "cash and carry" sales of goods directly to the ultimate consumers for consumption elsewhere.

The commenters are incorrect in their assertion that the phrase proposed for deletion, "no cost to the applicant," appears in the Act. It does not, and the Act provides no guidance as to which entity, as between the State, municipalities, or entities claiming exemptions, should bear the expense of claiming that exemption. The Department articulates its rationale for proposing to delete the prohibition against local health agencies assessing their inspection costs in the proposal Summary. The Department proposed the amendment upon reconsideration of the prohibition in response to a comment of the local health agency association, "and cognizant of the need to consider ways to minimize the economic impact of the regulatory mandate on local government in view of the financial challenges they face in determining exemption eligibility." 39 N.J.R. 2182(a) (June 4, 2007).

2. COMMENT: "The **New Jersey** Health Officers Association supports the proposed amendments to N.J.A.C. [8:6]-3.2 and 3.5. The proposed amendments are changes that were recommended by the **New Jersey** Health Officers Association in our comments generally supporting the Smoke-Free Air rules. We appreciate the [Department's] action to amend the [rules].

The proposed amendment will remove a financial burden on local health agencies and local municipalities. In addition, the amendments will enable the local health agency to better perform its duties by allowing better access to information.

Thank you for the proposed amendments, [of] which, again, our association is in favor ..." (7)

RESPONSE: The Department thanks the commenter for its support of the proposed amendments.

Federal Standards Statement

The Department is not adopting the adopted amendments and new rule under the authority of or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards, or requirements. Therefore, no Federal standards analysis is required.

Full text of the adoption follows:

<< [NJ ADC 8:6-3.2](#) >>

8:6-3.2 Local health agency conferral with permit entity; access for inspection

(a) (No change.)

(b) Upon reviewing any documents or information that the applicant submits pursuant to [N.J.A.C. 8:6-3.1](#), the local health agency may require the applicant to provide the local health agency and, at the option of the local health agency, any experts retained by the local health agency, with access to inspect one or more of the following:

1.-3. (No change.)

(c) (No change.)

<< [NJ ADC 8:6-3.5](#) >>

8:6-3.5 Local health agency conferral with permit entity as to changes since initial registration

(a) (No change.)

(b) Upon reviewing an application for renewal of the registration of an exempt cigar bar or cigar lounge, any supporting documentation, and the information the local health agency receives pursuant to (a) above, the local health agency may require the applicant to provide the local health agency, and, at the option of the local health agency, any experts retained by the local health agency, access to inspect one or more of the following:

1.-3. (No change.)

(c) (No change.)

<< [NJ ADC 8:6-4.3](#) >>

8:6-4.3 Local health agency conferral with permit entity; access for inspection

(a) Upon reviewing an executed form of notice and any supporting documentation or information an entity submits pursuant to [N.J.A.C. 8:6-4.1](#), a local health agency may require the entity to provide the local health agency and, at the option of the local health agency, any experts retained by the local health agency, with access to inspect one or more of the following:

1. Records of sales of tobacco products and accessories, and records of sales of other products; and

2. With respect to an establishment that is within or part of an indoor public place or a workplace:

i. The physical configuration of the establishment at which the proposed exempt tobacco retail establishment is located; and

ii. The ventilation systems at the establishment.

(b) The local health agency shall schedule any inspections it may require pursuant to (a) above so that the inspections occur within 20 business days of the local

health agency's receipt of a completed notice and supporting documentation.

39 N.J.R. 4395(b)
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