



KENTUCKY ASSOCIATION OF COUNTIES

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Memorandum

TO: Kentucky County Judge/Executives
Kentucky County Attorneys

FROM: Brian S. Roy *B.S.R.*
Executive Director/CEO

SUBJECT: Smoke-free Ordinances

DATE: September 12, 2017

Ellen J. Hahn, University of Kentucky Professor and Director of Breathe, requested to meet with KACo to discuss smoke-free ordinances. During our meeting last week, Dr. Hahn presented KACo with the attached document entitled '*Legal Authority to Regulate Smoking in Kentucky*' and asked if we would disseminate it to Kentucky's county governments along with our opinion as to whether or not it accurately reflects state law.

After staff reviewed the document, it does appear to accurately reflect a county's authority to regulate smoking. KACo, as a strong proponent of home rule, is not advocating for or against county ordinances regulating smoking as that is a local decision best left to each individual fiscal court. However, KACo is advising that county ordinances regulating smoking are permissible in Kentucky.

If you have questions regarding the enactment of ordinances regulating smoking, please contact KACo legal staff at the number listed above or Dr. Hahn at 859.257.2358 or ejhahn00@email.uky.edu. The Breathe website, which contains copies of county and city ordinances regulating smoking, is: www.breathe.uky.edu.

Thank you for your time and attention to this matter.

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Legal Authority to Regulate Smoking in Kentucky

Each year, more than 8,000 Kentuckians die of illnesses caused by tobacco use.¹ In addition to the human toll of tobacco use and exposure, Kentucky spends about \$1.9 billion on tobacco-related health care expenditures each year,² including \$128 million due to secondhand smoke exposure.³ Because there is no risk-free level of exposure to secondhand smoke, the only way to protect non-smokers is to eliminate secondhand smoke exposure.⁴

Roughly one-third of all Kentuckians are protected by local laws ensuring smoke-free enclosed public places and workplaces.

Over forty Kentucky communities have enacted smoke-free laws,⁵ and legal challenges have been brought in only a handful of Kentucky communities.⁶ Few challenges have been successful, and no lawsuits challenging a Kentucky smoke-free law have been filed in the past five years.

Because Kentucky courts have addressed a variety of legal theories raised in the few cases brought by those opposed to smoke-free laws, previous rulings provide a useful guide for Kentucky communities considering smoke-free legislation.

The Supreme Court of Kentucky has said that local communities have the legal authority to enact smoke-free laws.

The preemption doctrine emanates from the Supremacy Clause of the United States Constitution. The clause establishes that laws exist in a hierarchy from federal to state to local governments and that if the laws of two different levels of government conflict, the law of the “higher” level government trumps – or preempts – that of the “lower” level.

In 2004, the Supreme Court of Kentucky held that the Lexington-Fayette Urban County smoke-free ordinance was not preempted by state law.⁷ The court stated that cities’ and counties’ adoption of smoke-free ordinances is an appropriate use of their police power to promote and safeguard public health.⁸

Members of the public need to understand their obligations under the law.

The challengers in the Lexington-Fayette case also argued that certain provisions of the smoke-free law were unconstitutionally

vague because the public would not be able to reasonably determine what conduct amounted to a violation of the ordinance.⁹ While the court in the Lexington case ultimately struck one small clause in the law,¹⁰ other courts that have acknowledged vagueness arguments ultimately ruled on other grounds.¹¹

Cities and counties can better avoid constitutional challenges based on vagueness arguments by ensuring that smoke-free laws provide clear guidelines to the public.

Smoke-free laws should be comprehensive and treat similar businesses similarly.

Nationally, many challenges to smoke-free laws are brought by businesses arguing that exemptions to smoke-free laws are unfair because they allow smoking in certain places (e.g., casinos), while prohibiting smoking in other venues (e.g., bars). These businesses often argue that such exemptions violate the Equal Protection Clause of the U.S. and/or state Constitution.

While the Kentucky Supreme Court has never directly ruled on the constitutionality of exemptions to smoke-free laws, challenges to smoke-free laws in other jurisdictions on this basis are rarely successful. Because there are still expenses associated with successfully defending a law, a city or county can better avoid litigation – and better protect public health – if it enacts a smoke-free law that applies to

all enclosed public places and workplaces, without exceptions.

If a portion of a law is found to be unconstitutional, a severability clause may help the remainder of the law stand.

Courts are guided by the principle that laws are to be interpreted in a manner that preserves their constitutionality wherever possible.¹² A severability clause helps clarify the legislative body's intent that each provision can stand on its own.¹³ In a case from Louisville/Jefferson County, the Jefferson Circuit Court struck down an exemption that allowed smoking at Churchill Downs.¹⁴ While that issue was not decided by the Kentucky Court of Appeals, the appellate court held that the severability clause could preserve the remaining provisions of the smoke-free law.

Summary

Cities and counties in Kentucky have the authority to protect public health by enacting smoke-free laws. Nevertheless, opponents to regulation may challenge smoke-free laws either to overturn an existing law or to discourage lawmakers from acting.

While it's not always possible to predict if a law will be challenged, previous Kentucky court cases can help guide communities as they work to protect the public from secondhand smoke, as well as courts as they review smoke-free laws.

Last updated: March 2016

Notes

¹ Kentucky Cabinet for Health & Family Services, <http://chfs.ky.gov/dph/mch/hp/tobacco.htm> (last visited Feb. 13, 2016).

² Tobacco-Free Kids, *Key State-Specific Tobacco-Related Data & Rankings*, <http://www.tobaccofreekids.org/research/factsheets/pdf/0176.pdf> (last visited February 12, 2016).

³ Donald F. Behan et al., *Economic Effects of Environmental Tobacco Smoke*, Society of Actuaries (2005), <https://www.soa.org/Research/Research-Projects/Life-Insurance/research-economic-effect.aspx> (nationwide costs allocated to state based on its share of all U.S. smokers).

⁴ U.S. Dept. of Health & Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006), <http://www.ncbi.nlm.nih.gov/books/NBK44328/#rpt-smokeexp.ch1.s6>.

⁵ Kentucky Center for Smoke-free Policy, *Counties/Cities with Smoke-free Community-Wide Ordinances/Regulations in Kentucky*, <http://www.mc.uky.edu/tobaccopolicy/Ordinances/Smoke-freeOrdinances.HTM> (last visited Feb. 13, 2016).

⁶ While lawsuits have been filed from 2003 to 2016 in Bardstown, Bowling Green, Bullitt County, Campbell County, Frankfort, Hopkins County, Lexington, Louisville, and Paducah, the Bullitt County and Hopkins County litigation focused on issues of how Board of Health authority relates to Fiscal Court authority. Only two cases were heard by the Kentucky Supreme Court: one related to Bullitt County's Board of Health authority in relation to the Fiscal Court's authority, and the other from Lexington that affirmed local government authority to regulate smoking.

⁷ *Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't et al.*, 131 S.W.3d 745, 749 (Ky. 2004).

⁸ *Id.* at 749, 752. This case dealt with local legislative authority to enact smoke-free laws. Conversely, the Supreme Court held that the Bullitt County Board of Health exceeded its authority when it adopted a smoke-free regulation. *Bullitt Fiscal Court v. Bullitt County Board of Health*, 434 S.W.3d 29 (Ky. 2014).

⁹ *Lexington Fayette*, 131 S.W.3d at 745.

¹⁰ *Id.* at 753. The court held that the "reasonable distance" provision was not vague. The offending language in the Lexington-Fayette law, which was struck, related to a proprietor's duty to remove "smoking paraphernalia" from locations where smoking was prohibited.

¹¹ In *Louisville/Jefferson County v. Metro Louisville Hospitality Coalition, Inc.*, for example, the ordinance was challenged on several grounds, including vagueness. Ultimately, the court did not rule on the vagueness issue. 297 S.W.3d 42, 44 (Ky. Ct. App. 2009).

¹² *Louisville County v. Metro Louisville Hospitality*, 297 S.W.3d at 46.

¹³ Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Tobacco and Common Threats and Challenges: 2009* (2009), at 5.

¹⁴ *Metro Louisville Hospitality Coalition, Inc. v. Louisville/Jefferson County*, Nos. 06-CI-10176 & 06-CI-10668 (Jefferson Cir. Ct. Oct. 31, 2007).