

IN THE MISSOURI COURT OF APPEALS
FOR THE WESTERN DISTRICT

WD70576

CITY OF KANSAS CITY,
Respondent

v.

GEORGIA JEAN CARLSON,
Appellant

On Appeal from the Circuit Court of Jackson County
Honorable Richard T. Standridge, Associate Circuit Judge
Case No. 0816-CR06724

BRIEF OF AMICUS CURIAE, GENERAL CIGAR HOLDINGS, INC.

**FOLAND, WICKENS, EISFELDER,
ROPER & HOFER, P.C.**

P. BENJAMIN COX

Mo. Bar #60757

3000 Commerce Tower

911 Main Street

Kansas City, Missouri 64105

816.472.7474/Fax: 816.472.6262

ATTORNEYS FOR AMICUS CURIAE

Table of Contents

Table of Authorities iii

Interest of Amicus Curiae 1

Consent of the Parties 3

Jurisdictional Statement 3

Statement of Facts 3

Points Relied Upon 4

Argument 5

 I. Standard of Review 5

 II. Summary of the Argument 5

 III. Missouri law preempts municipal ordinances that directly conflict with state
 law upon the same subject. 6

 IV. The Municipal Smoking Ban and the Statewide Smoking Regulation are
 laws “upon the same subject.” 7

 V. The Municipal Smoking Ban and the Statewide Smoking Regulation
 directly conflict, so that the latter preempts the former under MO. REV.
 STAT. § 71.010. 10

 VI. Even if MO. REV. STAT. § 191.769 does not expressly exempt Tobacco
 Stores from smoking regulation (and it does), the Municipal Smoking Ban
 still violates MO. REV. STAT. § 71.010 because it prohibits what the
 Statewide Smoking Regulation *impliedly* permits..... 17

Conclusion	23
Certificate of Compliance	24
Certificate of Service	25
Appendix	26

Table of Authorities

Cases

<i>Borron v. Farrenkopf</i> , 5 S.W.3d 618 (Mo. Ct. App. 1999)	6, 13
<i>City of Belton v. Smoky Hill Ry. & Historical Society, Inc.</i> , 170 S.W.3d 429 (Mo. Ct. App. 2005).....	5
<i>City of Kan. City v. Dudley</i> , 224 S.W.3d 762 (Mo. Ct. App. 2008)	5
<i>City of Kan. City v. McGary</i> , 218 S.W.3d 449 (Mo. Ct. App. 2006)	5
<i>City of St. Louis v. Klausmeier</i> , 112 S.W. 516, 518-519 (Mo. en banc 1908).....	17, 18, 19
<i>City of St. Louis v. Stenson</i> , 33 S.W.2d 529 (Mo. 1960)	4, 6, 18, 19
<i>City of Meadville v. Caseleman</i> , 227 S.W.2d 77, 80 (Mo. 1950).....	18
<i>Kan. City v. La Rose</i> , 524 S.W.2d 112, 118 (Mo. 1975)	14, 17
<i>LDM, Inc. v. Princeton Reg'l Health Comm'n</i> , 764 A.2d 507, 519 (N.J. Super. Ct. Law Div. 2000)	4, 15, 16
<i>Morrow v. City of Kan. City</i> , 788 S.W.2d 278 (Mo. 1990)	4, 6, 13
<i>Olmstead v. United States</i> , 277 U.S. 438, 478 (1928)	13
<i>Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis County</i> , 636 S.W.2d 65, 67 (Mo. 1982)	4, 7, 17, 18, 19, 20, 21
<i>Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.</i> , 108 S. Ct. 1350, 1355 (U.S. 1988).....	20, 22
<i>Russell v. Raytown</i> , 544 S.W.2d 48, 51 (Mo. Ct. App. 1976)	12
<i>State ex rel. Burnau v. Valley Park Fire Prot. Dist. of St. Louis County</i> ,	

477 S.W.2d 734, 735 (Mo. Ct. App. 1972).....	18
<i>State ex rel. Sunshine Enters., Inc. v. Board of Adjustment of the City of St. Ann,</i>	
2001 Mo. App. LEXIS 243, *17 (Mo. Ct. App. Feb. 13, 2001).....	7

Constitution of the State of Missouri

MO CONST. Art. VI. §19(a).....	12
--------------------------------	----

Missouri Revised Statutes

MO. REV. STAT. § 71.010 (2008)	<i>passim</i>
MO. REV. STAT. § 191.765 (2008).....	4, 9
MO. REV. STAT. § 191.767 (2008).....	<i>passim</i>
MO. REV. STAT. § 191.769 (2008).....	<i>passim</i>
MO. REV. STAT. § 191.775 (2008)	21
MO. REV. STAT. § 191.776 (2008)	21
MO. REV. STAT. § 191.777 (2008)	21
MO. REV. STAT. § 304.190 (1949).....	18

Missouri Supreme Court Rules

MO. SUP. CT. R. 84.05.....	3
----------------------------	---

Opinions of the Attorney General for the State of Missouri

Attorney General Opinion No. 1986 Mo. AG LEXIS 6, at *17-18 (October 20,	
1986)	15

City of Kansas City Code of Ordinances

Sec. 34-471.....	1, 4, 8, 12
Sec. 34-472.....	1, 4, 8, 11, 12, 20

Sec. 34-473.....4, 8, 9, 13, 20

Sec. 34-475.....4, 8, 11

Other Authorities

Aristotle's Law of Identity, *Metaphysics*, Book VII, section 1714

Interest of Amicus Curiae

General Cigar Holdings, Inc. (“General Cigar”) files this Amicus Curiae brief in support of the Appellant, Georgia Jean Carlson.

General Cigar manufactures and markets handcrafted cigars. General Cigar produces Macanudo®, Partagas®, Cohiba®, Punch®, Excalibur®, Hoyo de Monterrey®, La Gloria Cubana®, and several other industry-leading brands, which are sold through tobacconists nationwide. Three tobacco stores in Kansas City sell General Cigar’s products. These stores are “places where more than fifty percent of the volume of trade or business carried on is that of blending of tobaccos or sale of tobaccos, cigarettes, pipes, cigars or smoking sundries.” *See* MO. REV. STAT. § 191.769(4) (2008). Forty-three such stores exist in Missouri.

State law permits smoking within these tobacco stores, *see id.*, but Kansas City Municipal Ordinance No. 080073 (App. A4-A14) (“Municipal Smoking Ban”) prohibits it. *See* Sec. 34-471 (defining public place broadly and specifically including retail stores) & Sec. 34-472 (prohibiting smoking in all enclosed public places).

The discrepancy between Missouri state law and the Municipal Smoking Ban is crucial to General Cigar’s business and trade. Under the Municipal Smoking Ban, General Cigar’s vendors are prohibited from allowing their patrons to smoke in their facilities. As such, patrons cannot sample General Cigar’s products in advance of purchase, which deflates sales, particularly with respect to General Cigar’s more expensive products. Customers are much less likely to

purchase a high-end box of cigars when municipal law prohibits them from sampling the product first. Moreover, the Municipal Smoking Ban discourages patrons from socializing at tobacco stores, which also deflates sales.

Appellant was fined for violating the Municipal Smoking Ban and argues that the state law on the same subject preempts the ordinance. General Cigar agrees, but General Cigar's concern differs from the Appellant's in that the Appellant was not fined for allowing smoking in a tobacco store. State law specifically exempts tobacco stores from smoking regulation, and General Cigar respectfully requests that the Court allow it to argue this point by granting its Motion for Leave to File Amicus Curiae Brief.

Consent of the Parties

The Appellant, Georgia Jean Carlson, consented to General Cigar's filing of this Amicus Curiae Brief. The Respondent, City of Kansas City, however, denied its consent. Accordingly, General Cigar files this brief conditionally, pursuant to MO. SUP. CT. R. 84.05(f)(3) and Rule XXVI(2) of the Special Rules of the Missouri Court of Appeals for the Western District. General Cigar files contemporaneously herewith its Motion for Leave to File Amicus Curiae Brief.

Jurisdictional Statement

General Cigar adopts the Appellant's Jurisdictional Statement.

Statement of the Facts

General Cigar adopts the Appellant's Statement of Facts.

Points Relied Upon

The trial court erred in holding that City of Kansas City Ordinance No. 080073 (“Municipal Smoking Ban”) is valid because, under MO. REV. STAT. § 71.010, a city may not enact an ordinance that directly conflicts with a state law on the same subject, in that the Municipal Smoking Ban prohibits smoking within areas specifically exempted by MO. REV. STAT. §§ 191.765, *et seq.*, (“Statewide Smoking Regulation”), so that a conflict exists with respect to what areas are subject to regulation.

MO. REV. STAT. § 71.010 (2008)

MO. REV. STAT. § 191.765 (2008)

MO. REV. STAT. § 191.767 (2008)

MO. REV. STAT. § 191.769 (2008)

Morrow v. City of Kan. City, 788 S.W.2d 278, 281 (Mo. 1990)

Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis County, 636 S.W.2d 65, 67
(Mo. 1982)

City of St. Louis v. Stenson, 33 S.W.2d 529 (Mo. 1960)

LDM, Inc. v. Princeton Reg’l Health Comm’n, 764 A.2d 507, 519 (N.J. Super. Ct.
Law Div. 2000)

Kansas City Municipal Ordinance No. 080073

Argument

The trial court erred in holding that the Municipal Smoking Ban is valid because, under MO. REV. STAT. § 71.010, a city may not enact an ordinance that directly conflicts with a state law on the same subject, in that the Municipal Smoking Ban prohibits smoking within areas specifically exempted by the Statewide Smoking Regulation, so that a conflict exists with respect to what areas are subject to regulation.

I. Standard of Review

Whether Missouri state law preempts a city ordinance is a question of law that the appellate court reviews *de novo*. *City of Belton v. Smoky Hill Ry. & Historical Society, Inc.*, 170 S.W.3d 429, 433 (Mo. Ct. App. 2005). Moreover, the Appellant and the Respondent have stipulated to all material facts, *see* Stipulation by the Parties, (App. A26), and therefore a pure question of law is presented, triggering *de novo* review. *City of Kan. City v. Dudley*, 224 S.W.3d 762, 763 (Mo. Ct. App. 2008). “Furthermore, municipal ordinance provisions imposing penalties are strictly construed against the municipality and will not be extended by implication.” *City of Kan. City v. McGary*, 218 S.W.3d 449, 452 (Mo. Ct. App. 2006).

II. Summary of the Argument

The question presented here is whether, under MO. REV. STAT. § 71.010, the City of Kansas City can prohibit smoking in tobacco stores and certain bars and restaurants when the state law on the same subject specifically exempts those

areas from its smoking regulation. The answer is “no.” Municipal ordinances cannot directly conflict with state law, and they cannot prohibit what state law permits. Here, there is a direct conflict between the laws in that the municipal ordinance prohibits what state law permits: smoking within tobacco stores and certain bars and restaurants.

The Appellant was convicted of violating the Municipal Smoking Ban notwithstanding that she and her employer, JC’s Sport’s Bar, complied with the terms of the exemption found in MO. REV. STAT. § 191.769. That statute also exempts tobacco stores, and, as explained in General Cigar’s statement of Interest of Amicus Curiae, smoking within such places is crucial to General Cigar’s business and trade.

III. Missouri law preempts municipal ordinances that directly conflict with state law upon the same subject.

A municipal corporation, like the City of Kansas City, “shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with state law upon the same subject.” MO. REV. STAT. § 71.010 (2008). All municipal ordinances, even those enacted by a constitutional charter city, must be construed in light of MO. REV. STAT. § 71.010. *City of St. Louis v. Stenson*, 333 S.W.2d 529, 535 (Mo. 1960). If a local law is in “direct conflict with state law, then the local law is determined to be contrary to the state law and, therefore, invalid.” *Borron v. Farrenkopf*, 5 S.W.3d 618, 622 (Mo. Ct. App. 1999) (citing *Morrow v. City of Kan. City*, 788 S.W.2d 278, 281 (Mo. 1990)). The test is

whether the local law prohibits what the state law permits.¹ *State ex rel. Sunshine Enters., Inc. v. Board of Adjustment of the City of St. Ann*, 2001 Mo. App. LEXIS 243, *17 (Mo. Ct. App. Feb. 13, 2001). “An ordinance may supplement a state law, but when the expressed or implied provisions of each are in irreconcilable conflict, then the statute annuls the ordinance.” *Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis County*, 636 S.W.2d 65, 67 (Mo. 1982) (internal citation omitted).

IV. The Municipal Smoking Ban and the Statewide Smoking Regulation are laws “upon the same subject.”

General Cigar submits that the Municipal Smoking Ban’s definition of “public place” directly conflicts with the Statewide Smoking Regulation’s definition of the same term, which specifically exempts tobacco stores from smoking regulation. The conflict, however, does not matter, unless the two laws are “upon the same subject.” MO. REV. STAT. § 71.010 (2008).

The subject matter surrounding the exemption contained in the Statewide Smoking Regulation and the absence of such an exemption contained in the Municipal Smoking Ban is unquestionably the same. The Municipal Smoking Ban cites its purpose as “promot[ing] public health by decreasing citizens [sic]

¹ A local law that permitted what a state law prohibited would also violate MO. REV. STAT. § 71.010, *see id.*, but that aspect of the doctrine is not at issue here.

exposure to secondhand smoke and creat[ing] smoke free environments for workers and citizens through regulation in the work place *and all public places.*” See Ordinance No. 080073, Sec. 34-471 (emphasis added)). Further, the Municipal Smoking Ban prohibits smoking “in all enclosed *public places.*” See City of Kansas City Code of Ordinances, Ordinance No. 080073, (“Ordinance No. 080073”) Sec. 34-473(b) (emphasis added). The Municipal Smoking Ban does not purport to regulate smoking in any private place. Thus, its definition of “public place” is crucial to the ordinance’s scope.

Public Place means any enclosed area to which the public is invited or in which the public is permitted, including but not limited to banks, educational facilities, health facilities, laundering facilities, public transportation facilities, reception areas, production and marketing establishments, retail service establishments, **retail stores**, theaters, and waiting rooms. **A private residence is not a public place.**

See Ordinance No. 080073, Sec. 34-472 (italics in original) (bold added). Thus, the Municipal Smoking Ban regulates smoking within the public sphere, but it does not attempt to regulate smoking in private residences, *see id.*, other areas deemed private (e.g., 25% of a hotel’s private rooms), or other exempt areas (e.g., casinos). See Ordinance No. 080073, Sec. 34-475.

Likewise, the Statewide Smoking Regulation regulates smoking within “public places” throughout Missouri. MO. REV. STAT. § 191.767 states that no

person shall smoke in a public place or in a public meeting. Importantly, however, the Statewide Smoking Regulation at no point attempts to regulate smoking in any place deemed non-public, and it spends great effort in defining what places it considers public, and which places it considers non-public. *See* MO. REV. STAT. § 191.765(5)(a)-(h) (2008); MO. REV. STAT. § 191.769. Thus, the definition of “public place” is equally crucial to the Statewide Smoking Regulation’s scope, for it regulates smoking in *all* “public place[s]” and exempts several specific areas from that domain. *See* MO. REV. STAT. § 191.765(5)(a)-(h) (2008); MO. REV. STAT. § 191.769.

As such, the Municipal Smoking Ban and the Statewide Smoking Regulation are “upon the same subject,” *see* MO. REV. STAT. § 71.010 (2008), because they both regulate smoking within public places, and neither attempts to regulate smoking within private places. MO. REV. STAT. § 191.767 (2008); Ordinance No. 080073, Sec. 34-473(b). Thus, to the extent the two laws conflict with respect to regulating smoking within the public sphere, Missouri law preempts and invalidates the ordinance. MO. REV. STAT. § 71.010 (2008).

V. The Municipal Smoking Ban and the Statewide Smoking Regulation directly conflict, so that the latter preempts the former under MO. REV. STAT. § 71.010.

A. The definitions of “public place” within the two laws conflict, so that smoking is permitted in certain areas under state law but prohibited under the municipal ordinance.

The Municipal Smoking Ban attempts to regulate smoking in areas that the Legislature exempted from smoking regulation. That is, notwithstanding that the Legislature specifically exempted certain places from the definition of “public place,” the Municipal Smoking Ban attempts to regulate smoking within some of these areas by redefining the term “public place” to include areas that fall within the state law exemption.

MO. REV. STAT. § 191.769 states that

[t]he following areas are not considered a public place . . . (4) A place where more than fifty percent of the volume of trade or business carried on is that of the blending of tobaccos or sale of tobaccos, cigarettes, pipes, cigars or smoking sundries; (5) Bars, taverns, restaurants that seat less than fifty people . . . which

conspicuously post signs stating that “Nonsmoking Areas are Unavailable.”²

By contrast, the Municipal Smoking Ban defines “public place” as “any enclosed area to which the public is invited or in which the public is permitted.” Ordinance No. 080073, Sec. 34-472. Like the Statewide Smoking Regulation, the Municipal Smoking Ban specifically exempts certain places from its broad definition of “public place,” *see* Ordinance No. 080073, Sec. 34-475; importantly, however, that section exempts neither Tobacco Stores nor Complying Bars/Restaurants, and such places clearly otherwise fall under the Municipal Smoking Ban’s broad definition of “public place.” *See* Ordinance No. 080073, Sec. 34-472.

Thus, for the purposes of smoking regulations, under Missouri state law, Tobacco Stores and Complying Bars/Restaurants *are not* public places and thus *are exempt* from regulation; under Kansas City municipal law, they *are* public

² These two examples are highlighted because subsection 4 exempts General Cigar’s customers and subsection 5 exempts JC’s Sports Bar, which was under the control of the Appellant at the time she allegedly violated the Municipal Smoking Ban. *See* Stipulation of Parties (App. A26, ¶ 1). For the remainder of this brief, areas exempted by subsection 4 will be referred to as “Tobacco Stores,” and areas exempted by subsection 5 will be referred to as “Complying Bars/Restaurants.”

places and thus *are not exempt* from regulation. *Cf.* MO. REV. STAT. § 191.769 (2008) *with* Ordinance No. 080073, Sec. 34-472.

As such, smoking within Tobacco Stores is *permitted* under the Statewide Smoking Regulation, *see* MO. REV. STAT. § 191.769 (2008); under the Municipal Smoking Ban, it is *prohibited*. *See* Ordinance No. 080073, Secs. 34-471 & 34-472.

B. The direct conflict between the Statewide Smoking Regulation and the Municipal Smoking Ban creates disharmony between state and local law, and the former therefore preempts the latter.

Municipal authorities shall confine their jurisdiction to passing ordinances “in harmony” with state law on the same subject. *Russell v. Raytown*, 544 S.W.2d, 48, 51 (Mo. Ct. App. 1976) (“It is, of course, a matter of settled law that an ordinance of the City must be in harmony with State statutes.”); MO. REV. STAT. § 71.010 (2008); MO CONST. Art. VI. §19(a). As has been shown in the previous two sections, the Municipal Smoking Ban and the Statewide Smoking Regulation are on the same subject in that they regulate smoking within the public sphere, and the former directly conflicts with the latter in that it attempts to regulate smoking in areas specifically exempted by the Statewide Smoking Regulation.

A direct conflict between state law and municipal law, such that the latter prohibits what the former permits, renders the municipal law invalid under MO.

REV. STAT. § 71.010 and Missouri’s preemption doctrine. *Morrow*, 788 S.W.2d at 281; *Borron*, 5 S.W.3d at 622.

The Statewide Smoking Regulation and the Municipal Smoking Ban “directly conflict,” because the former specifically excludes Tobacco Stores and Complying Restaurants/Bars from the area that both laws seek to regulate, public places,³ while the latter seeks to regulate those establishments. In essence, the Legislature has removed certain areas from the field of play, and the City of Kansas City has attempted to put those areas back in play. The City’s attempt to do so creates disharmony between state and local law, and the former trumps. MO. REV. STAT. § 71.010 (2008).

Because the Municipal Smoking Ban regulates smoking in areas that the Statewide Smoking Regulation exempts from regulation, a direct conflict exists, and therefore the Municipal Smoking Ban violates MO. REV. STAT. § 71.010 and is preempted. *Morrow*, 788 S.W.2d at 281; *Borron*, 5 S.W.3d at 622.

³ Whether the City of Kansas City has the power to regulate smoking in *private* places is an academic issue because, at present, it lacks the inclination to do so. See Ordinance No. 080073, Sec. 34-473 (failing to extend its application to any “private” place). Certainly, if the City of Kansas City purported to regulate activities that it defined as “private,” other preemption questions, as well as the Constitutional “right to be let alone,” see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, dissenting), would be triggered.

C. The City of Kansas City may regulate “public place[s]” more strictly than state law regulates them, but it cannot regulate areas that state law specifically exempts from regulation.

The City of Kansas City will argue that it may regulate smoking more strictly than state law regulates smoking. General Cigar appreciates and acknowledges that a municipal ordinance may regulate an activity more strictly than state law regulates it, *see, e.g., Kan. City v. La Rose*, 524 S.W.2d 112, 118 (Mo. 1975), but it respectfully submits that the rule does not apply to this case.

A city’s power to regulate a subject more strictly does not permit the city to fundamentally redefine the regulated field, in this case public places. That is, a city is allowed to regulate smoking in a “public place” more strictly, but it cannot change what a public place is, once the Legislature has expressly exempted certain places from the definition of “public place” for the purpose of smoking regulation. “A” is “A,” and “A” cannot be “B.”⁴ The city can take “A” and subject it to stricter regulations, but it cannot change “A” into “B,” particularly when the state has specifically defined “A” to exclude “B.”

To illustrate, a city could decree that “no ‘public place’ shall have more than *fifteen percent* of its entire space designated as a smoking area.” Such an ordinance would regulate public places more strictly than the Legislature regulates

⁴ Aristotle’s Law of Identity, *Metaphysics*, Book VII, section 17.

them. *Cf.* MO. REV. STAT. § 191.767 (2008) (requiring that no “public place” shall have more than *thirty percent* of its entire space designated as a smoking area). However, a city could not decree that a private residence is a public place for the purposes its smoking regulation, because the Legislature has specifically exempted private residences from being regulated as a public place for the purposes of smoking. *See* MO. REV. STAT. § 191.769(6) (2008); *cf.* Attorney General Opinion No. 1986 Mo. AG LEXIS 6, at *17-18 (October 20, 1986) (opining that a city’s ordinance would be preempted when, for the purposes of regulating obscenity, it changed the definition of the term “displays publicly” to include areas that were excluded by the state law’s definition of that term).

That the Legislature specifically exempted Tobacco Stores and Complying Bars/Restaurants from the definition of “public place” evinces its intention to exempt such places from smoking regulation. When a legislature specifically exempts areas that would otherwise be governed by a given statute, it “intentionally free[s] them from regulation and ha[s] no intention of permitting any other public body . . . to overrule that decision.” *LDM, Inc. v. Princeton Reg’l Health Comm’n*, 764 A.2d 507, 519 (N.J. Super. Ct. Law Div. 2000).

LDM speaks directly to this point. There, the New Jersey statewide smoking regulation’s purpose was to regulate smoking *in restaurants*. *Id.* at 518. “Restaurant” was defined broadly and in a way that could have included some bars: a restaurant was “any facility or part thereof in which food is prepared and provided or served for consumption” *Id.* (quoting N.J.S.A. 26:3E-1).

However, the New Jersey Legislature went on to specifically exempt bars from the regulated field, in that case, “restaurants.” *Id.* (“[T]he provisions of this act shall apply to restaurants but shall not apply to any bar.”) (quoting N.J.S.A. 26:3E-9). The municipal authority argued that, since bars were not regulated by the state law, municipal authorities were free to regulate bars under their general powers. *Id.* The court rejected the argument because the state law’s purpose was to regulate restaurants, and the Legislature *expressly exempted* bars from the definition of that term. *Id.* at 519 (“[T]he statute contains an express exemption for bars.”). The court held further that: “[i]t would be illogical to permit municipal smoking bans in bars; the exact type of establishment the Legislature determined should be entirely free from regulation.” *Id.*⁵

Here, the Statewide Smoking Regulation also contains an express exemption, and it would be illogical to allow the City of Kansas City to contravene it. In *LDM*, the Legislature sought to regulate restaurants and specifically exempted bars from that term; here, the Legislature sought to regulate public places and specifically exempted Tobacco Stores from that term. MO. REV. STAT. § 191.769(4) & (5) (2008). Missouri law permits the City of Kansas City to

⁵ New Jersey law contains a preemption standard that is substantially the same as Missouri’s: in New Jersey, “an ordinance will fail if it permits what a statute expressly forbids or forbids what a statute expressly authorizes.” *LDM*, 764 A.2d at 515; *cf. Morrow*, 788 S.W.2d at 281.

regulate public places more strictly, *see, e.g., La Rose*, 524 S.W.2d at 118, but it does not permit the City of Kansas City to override the Legislature’s express exemption of the regulated subject matter. MO. REV. STAT. § 71.010 (2008); *cf. LDM*, 764 A.2d at 518-519. As such, the Municipal Smoking Ban is invalid because it prohibits smoking in Tobacco Stores and Complying Bars/Restaurants, areas that the Legislature specifically exempted from the regulated subject matter. MO. REV. STAT. § 191.769 (2008).

VI. Even if MO. REV. STAT. § 191.769 does not expressly exempt Tobacco Stores from smoking regulation (and it does), the Municipal Smoking Ban still violates MO. REV. STAT. § 71.010 because it prohibits what the Statewide Smoking Regulation *impliedly* permits.

The Municipal Smoking Ban will fail if it prohibits what the Statewide Smoking Regulation impliedly permits. *Page W.*, 636 S.W.2d at 67 (“[W]hen the expressed or *implied* provisions [of a state statute and a local ordinance] are inconsistent and in irreconcilable conflict, then the statute annuls the ordinance.”) (citing *City of St. Louis v. Klausmeier*, 112 S.W. 516, 518-519 (Mo. en banc 1908)) (emphasis added).

A. When a state law recognizes a practice, it implicitly permits that practice.

When state law regulates a practice, by implication it permits the practice, and a municipality cannot prohibit the practice without violating the preemption

doctrine. *Page W.*, 636 S.W.2d at 67 (holding that the Legislature’s regulation of self service gasoline pumps impliedly permitted their use, and a city could therefore not prohibit their use); *City of Meadville v. Caseleman*, 227 S.W.2d 77, 80 (Mo. 1950) (holding that the Legislature’s grant of authority to *regulate* pool halls by implication denied a city the power to *prohibit* pool halls); *State ex rel. Burnau v. Valley Park Fire Prot. Dist. of St. Louis County*, 477 S.W.2d 734, 735 (Mo. Ct. App. 1972) (holding that the State’s regulatory approval of certain fireworks permitted their use, and a protection district could therefore not prohibit them).

Preemption by implied permission was found in *City of St. Louis v. Stenson*, 333 S.W.2d 529 (Mo. 1960). In *Stenson*, the state statute at issue stated, in relevant part, that “[n]o motorized vehicle . . . shall exceed . . . forty-five feet in length.” 333 S.W.2d at 533 (citing MO. REV. STAT. § 304.190 (1949)). The mere proscription of cars in excess of forty-five feet in length was not an *express* grant of authority for Missourians to drive shorter cars. Nevertheless, the Court ruled that the state statute permitted the practice of driving any car whose length did not exceed forty-five feet. *Id.* Thus, when the City of St. Louis attempted to prohibit the operation of cars in excess of thirty-three feet on a certain road, the ordinance was preempted because it prohibited what the state statute impliedly permitted, that is, operating a car whose length was greater than thirty-three feet but less than forty-five feet. *Id.*; *see also Klausmeier*, 112 S.W. at 519 (holding that, by

criminalizing the sale of skim milk with less than 9.25% solid content, the state *impliedly permitted* the sale of skim milk with solid content greater than that amount).

B. State law recognizes the practice of smoking within Tobacco Stores, and thus it implicitly permits the practice, and a municipal ordinance cannot prohibit the practice entirely.

The Statewide Smoking Regulation impliedly permits proprietors of Tobacco Stores to allow smoking at their establishments. If the Legislature did not contemplate smoking in such places, it would not have exempted Tobacco Stores and Complying Bars/Restaurants from the requirements of MO. REV. STAT. § 191.767. *See* MO. REV. STAT. § 191.769(4) & (5) (2008). Since the Legislature contemplated smoking in such establishments yet did not proscribe smoking in them, it impliedly permitted the practice. *See Stenson*, 33 S.W.2d at 533 (state law specified that cars in excess of 45 feet in length were unlawful; therefore state impliedly permitted cars whose length did not exceed that distance); *Klausmeier*, 112 S.W. at 519 (state law specified that the sale of skim milk composed of less than 9.25% solid content was unlawful; therefore state impliedly permitted the sale of milk composed of greater percentage of solid content).

Since a city may not entirely prohibit what the Legislature impliedly permits, *see, e.g., Page W.*, 636 S.W.2d at 67, the City of Kansas City cannot entirely prohibit smoking in Tobacco Stores, which is precisely what it attempted

to do. *See* Ordinance No. 080073 Secs. 34-472 & 473 (prohibiting smoking in public places and not exempting Tobacco Stores from the broad definition of that term). The Legislature recognizes the practice of smoking in Tobacco Stores, and therefore the City of Kansas City may not prohibit that practice entirely. *Page W.*, 636 S.W.2d at 67.

C. The Legislature’s actions further imply that it intended to preempt municipal ordinances from entirely prohibiting smoking within Tobacco Stores.

When a state regulatory statute contemplates the existence of practice and then intentionally removes that practice from the regulated field, a preemptive inference can be drawn. *See Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1355 (U.S. 1988) (“Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn -- not from federal inaction alone, but from inaction joined with action.”).

Here, it cannot be seriously disputed that the Legislature intentionally left Tobacco Stores and Complying Bars/Restaurants out of the regulated field and thus permitted smoking in those establishments by implication. Indeed, the City of Kansas City does not dispute it: the City of Kansas City stipulates that the Statewide Smoking Regulation *permitted* the Appellant to maintain JC’s Sports Bar with no non-smoking areas. *See* Stipulation of the Parties, (App. A26, ¶ 5). A

city may not prohibit what state law permits, and this principle applies whether the permission is express or implied. *Page W.*, 636 S.W.2d at 67. As such, the Municipal Smoking Ban prohibits what the Statewide Smoking Regulation permits, and therefore it violates MO. REV. STAT. § 71.010.

Further, the Legislature manifested its intention to preempt the regulation of Tobacco Stores by enacting MO. REV. STAT. § 191.777. That section states that nothing in the Statewide Smoking Regulation prohibits political subdivisions and local school boards from enacting ordinances that are more stringent than §§ 191.775 and 191.776 of the act. MO. REV. STAT. § 191.775 regulates (but does not prohibit entirely) smoking in and around public schools. MO. REV. STAT. § 191.776 prohibits smoking in childcare facilities, during the time when children are or may be present. In MO. REV. STAT. § 191.777, then, the Legislature ensured that local governments could protect schools and childcare facilities more strictly if they so chose. If the Legislature intended for the *entire* Statewide Smoking Regulation to be subject to stricter local ordinances, there would have been no need for MO. REV. STAT. § 191.777. Moreover, if the Legislature wanted to ensure that some exempted areas (but not others) would be subject to stricter local ordinances, it easily could have done so in MO. REV. STAT. § 191.777. It chose not to do so. Thus, the Legislature's action in mandating that local governments could impose stricter rules on schools and childcare facilities, coupled with its inaction in failing to so mandate with respect to Tobacco Stores, enables the Court

to draw a preemptive inference with respect to Tobacco Stores. *See Isla Petroleum Corp.*, 108 S. Ct. at 1355 (inaction joined with action reveals preemptive inference).

The same rationale applies to MO. REV. STAT. § 191.767(2). There, the Legislature stated that a smoking area may be designated in public places, *unless other law or ordinance prohibits it*. MO. REV. STAT. § 191.767(2) (2008). Again, however, no such provision applies to non-public places like Tobacco Stores or Complying Bars/Restaurants.⁶ Thus, if the Legislature wanted to mandate that the exemptions contained in MO. REV. STAT. § 191.769 were subject to municipal override, it clearly knew how to do so. That it chose to so mandate with respect to some, but not all, of the Statewide Smoking Regulation, reveals its preemptive intention with respect to Tobacco Stores. *See Isla Petroleum Corp.*, 108 S. Ct. at 1355.

⁶ In this respect, MO. REV. STAT. § 191.767(2) confirms the analysis in section V(C) above, wherein General Cigar argues that the City of Kansas City can regulate *public places* more strictly, but it cannot override the Legislature's express exemption of non-public places like Tobacco Stores.

Conclusion

In the Statewide Smoking Regulation, the Legislature exempted Tobacco Stores from the regulated field of smoking within public places. In prohibiting smoking within Tobacco Stores, the Municipal Smoking Ban directly conflicts with the state law exemption on the same subject; therefore, the Municipal Smoking Ban is preempted. Even if the Legislature did not expressly exempt Tobacco Stores (and it did), the Statewide Smoking Regulation impliedly permits smoking within Tobacco Stores, and a municipal ordinance cannot prohibit what state law impliedly permits.

WHEREFORE, General Cigar Holdings, Inc., Amicus Curiae in support of Appellant Georgia Jean Carlson, respectfully prays that the Court enter an order, reversing the trial court's Judgment of January 16, 2009, declaring City of Kansas City Ordinance No. 080073 to be invalid, and for all other relief to which it may be entitled.

Respectfully submitted,

**FOLAND, WICKENS, EISFELDER,
ROPER & HOFER, P.C.**

P. BENJAMIN COX

Mo. Bar #60757

3000 Commerce Tower

911 Main Street

Kansas City, Missouri 64105

816.472.7474/Fax: 816.472.6262

ATTORNEYS FOR AMICUS CURIAE

P. Benjamin Cox, Mo. Bar No. 60757

Certificate of Compliance

I hereby certify that the enclosed CD-ROM has been scanned for viruses using Norton AntiVirus 2008 and is virus free, and that I used Microsoft Word 2000 for word processing. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that this brief contains 4,922 words.

Attorney

Certificate of Service

I hereby certify that on February ____, 2009, I mailed a true and accurate copy and CD-ROM of the foregoing to the following:

Lowell C. Gard,
1st Assistant City Prosecutor
1101 Locust Street
Kansas City, Missouri 64106
Telephone: (816) 513-3806
Facsimile: (816) 513-3815

Counsel for Respondent

Jonathan Sternberg
7th Floor, Harzfeld's Building
1111 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474 -5533
jonathan@sternberg-law.com

Counsel for Appellant

Attorney

