

**WD70576**

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**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**CITY OF KANSAS CITY,**

**Respondent,**

**vs.**

**GEORGIA JEAN CARLSON,**

**Appellant.**

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

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**BRIEF OF THE APPELLANT**

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## **Jurisdictional Statement**

Appellant appeals from a judgment of conviction and sentence entered against her in the Circuit Court of Jackson County for violating a municipal ordinance of Respondent City of Kansas City. The case was before the Circuit Court on trial *de novo* from the Kansas City Municipal Division. Appellant questions the constitutional validity of the ordinance under which she was convicted and sentenced to pay a fine.

Cases involving the constitutional validity of a municipal ordinance are not part of the Supreme Court's exclusive jurisdiction under MO. CONST. Art. V, § 3. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. banc 1997). Therefore, jurisdiction of this appeal lies in the Missouri Court of Appeals. *Id.* This case arose in Jackson County. Pursuant to § 477.070, R.S.Mo., venue lies in the Western District.

## Statement of Facts

### **A. City of Kansas City Ordinance No. 080073.**

In January of 2008, the Mayor and City Council of Respondent City of Kansas City received an initiative petition containing a proposed ordinance “prohibiting smoking in enclosed places of employment and public places and public sidewalks abutting acute care hospital property lines.” (Legal File 48; Appendix A6). Pursuant to the City Charter, the City Clerk certified the petition and the Mayor and City Council submitted the proposed ordinance to a citywide election to be held the following April. (L.F. 48; Appx. A6).

In the election, the proposed ordinance passed by a margin of 2,191 votes, approximately four percent of the total entered. (L.F. 61). On June 21, 2008, it went into effect as City of Kansas City Ordinance No. 080073 (hereinafter “the Ordinance”). (L.F. 48, 99; Appx. A6).

The Ordinance declares its purpose to be “that the City promotes public health by decreasing citizens’ exposure to secondhand smoke and creates smoke free environments for workers and citizens through regulation in the work place and all public places.” (L.F. 50; Appx. A8). It repealed the existing text of Article XII of Chapter 34 of Kansas City’s Code of Ordinances, and replaced that text with its own. (L.F. 50; Appx. A8). The Ordinance comprises §§ 34-471 through 34-481 of Kansas City’s Code of Ordinances. (L.F. 50-57; Appx. A8-15).

The Ordinance prohibits “the possession of lighted smoking materials in any form” in “all enclosed places of employment” and “all enclosed public places” within

Kansas City. (L.F. 52; Appx. A10). “Enclosed” means “a space bounded by walls (with or without windows) continuous from the floor to the ceiling.” (L.F. 51; Appx. A9). A “place of employment” is “any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment.” (L.F. 51; Appx. A9). The Ordinance exempts private residences from this definition unless they are “used as a childcare, adult day care or health care facility.” (L.F. 51; Appx. A9). It defines “public place” as “any enclosed area to which the public is invited or in which the public is permitted,” again exempting private residences. (L.F. 52; Appx. A10).

The Ordinance lists eighteen nonexclusive examples of the “enclosed public places” where it prohibits smoking, among which are “bars” and “billiard halls.” (L.F. 52-53; Appx. A10-11). The Ordinance makes it “unlawful for any person to violate” this prohibition. (L.F. 54; Appx. A12). The only areas exempted from the Ordinance’s blanket prohibition are (1) “private residences, not serving as enclosed places of employment or enclosed public places,” (2) a percentage of hotel and motel rooms, and (3) “casino gaming areas,” which are exempt “until all casinos located in the Missouri counties of Jackson, Platte and Clay, and the Kansas counties of Johnson and Wyandotte ... are obligated by ordinance, statute or law to prohibit smoking within the casino areas where gambling games are allowed.” (L.F. 54-55; Appx. A12-13).

Any person who smokes in an area where the Ordinance prohibits smoking is “shall be guilty of an ordinance violation, punishable by a fine” of up to \$50.00. (L.F. 55; Appx. A13). Likewise, a person in control of a place in which the Ordinance prohibits smoking who violates his or her responsibilities under it is to be fined no more

than \$100.00 for the first violation, no more than \$200.00 for a second violation within a one-year period, and no more than \$500.00 for a third violation or subsequent violations within a one-year period. (L.F. 55; Appx. A13). The fines are per diem, rather than per incident. (L.F. 55; Appx. A13).

The Ordinance sets forth a variety of “[r]esponsibilities” that a person in control of a place where smoking is prohibited, such as the enclosed portion of a bar or billiard parlor, must meet in order to avoid violating it. (L.F. 54; Appx. A12). She “shall not knowingly cause to permit, cause, suffer or allow any person” to smoke tobacco “in that place.” (L.F. 54; Appx. A12). She must post a “no smoking” sign near each entrance to the area and must “maintain a written smoking policy” with specific language stating that smoking is prohibited therein. (L.F. 54; Appx. A12). “It shall be the responsibility of employers to provide smoke-free workplaces for all employees.” (L.F. 54; Appx. A12).

The authority to enforce the Ordinance is “vested in the Director of Health and his or her duly authorized representative,” although whenever “the need arises, the Director of Health may call upon the fire and police departments and other departments of the City to aid in” enforcement. (L.F. 56-57; Appx. A14-15). Any citizen may register a complaint under the Ordinance with the Kansas City Health Department to “initiate enforcement.” (L.F. 57; Appx. A15).

## **B. JC’s Sports Bar**

Appellant Georgia Jean Carlson is employed as a bartender and night manager at an establishment named JC’s Sports Bar (hereinafter “JC’s”), a small bar and billiard

parlor located at 6135 Vivion Road in Kansas City, Missouri. (L.F. 4, 23, 99). JC's is owned by Mrs. Jacklen Mattivi, Appellant's employer. (L.F. 94-98, 99).

Mrs. Mattivi holds a variety of state and local licenses for JC's. (L.F. 94-98).

They are:

- a Retail Sales License issued by the State of Missouri (L.F. 94);
- a Business License issued by Kansas City (L.F. 95);
- a license to sell liquor at retail by the drink issued by the State of Missouri (L.F. 96);
- a license to sell liquor at retail by the drink until 3:00 a.m. issued by the State of Missouri (L.F. 97); and
- a license issued by Kansas City to sell liquor at retail by the drink, to do so until 3:00 a.m., and to operate pool tables. (L.F. 98).

Mrs. Mattivi has no food permit for JC's (L.F. 32). Food is neither sold nor served there. (L.F. 32). The total area of JC's enclosed space is 2,000 square feet. (L.F. 98). The establishment seats 47 people. (L.F. 32, 99).

Mrs. Mattivi always has allowed tobacco smoking inside JC's, without limitation. (L.F. 99). In doing so, she conspicuously posts signs stating that "Nonsmoking Areas are Unavailable." (L.F. 99). But for the Ordinance, Mrs. Mattivi would maintain no nonsmoking areas inside JC's. (L.F. 99).

### **C. Proceedings below**

On the evening of July 18, 2008, while Appellant was in control of JC's Sports Bar, Mr. Yousef Jouhari of the Kansas City Health Department issued Appellant a

citation charging her with having violated § 34-474(c) of the Ordinance because she “[d]id as a person having control of a bar, an enclosed place of employment within the City, fail or refuse to provide and maintain a workplace free of smoking of tobacco by allowing patrons to smoke in the establishment.” (L.F. 4, 46).

On August 22, before her arraignment in the Municipal Division, Appellant moved to dismiss the charge against her. (L.F. 5-18). She explained that Missouri’s Indoor Clean Air Act, §§ 191.765 through 191.777, R.S.Mo. (hereinafter “ICAA”), permits her to allow smoking inside JC’s without limitation, and thus the Ordinance under which she was being prosecuted for allowing patrons to smoke inside JC’s was in conflict with the state law and was invalid. (L.F. 5-6). Accordingly, she argued that she could not be held criminally liable for violating an ordinance that was unconstitutional *ab initio*, and thus the charge against her could not stand. (L.F. 17).

On November 14, 2008, the Municipal Division overruled Appellant’s motion and proceeded with arraignment. (L.F. 19). Appellant pleaded not guilty. (L.F. 19). The court found her guilty and sentenced her to pay a fine of \$100.00. (L.F. 19).

Appellant immediately elected to try the case *de novo* before the Circuit Court of Jackson County. (L.F. 20, 21). The Municipal Division set a trial *de novo* bond of \$0.00. (L.F. 19).

On November 25, Appellant moved the Circuit Court to dismiss the charge against her, making the same conflict preemption argument she had brought before the Municipal Division. (L.F. 22). She attached copies of both the Ordinance and its election results as

exhibits to her motion. (L.F. 47-61). Both copies were certified by Respondent's City Clerk. (L.F. 47, 58).

On December 11, 2008, Appellant and the City stipulated to these facts:

1. On or about July 18, 2008, at 7:30 p.m., Defendant Georgia Jean Carlson did, as a person having control of JC's Sports Bar, a bar which is an enclosed place of employment within the City of Kansas City, Missouri, fail to provide and maintain a workplace free of tobacco smoking by allowing patrons to smoke in the establishment.
2. The owner of JC's Sports Bar is Ms. Jacklyn [*sic*] Mattivi.
3. JC's Sports Bar is a "[b]ar[]" that seat[s] less than fifty people" within the meaning of § 191.769(5), R.S.Mo.
4. JC's Sports Bar is a "billiard parlor[]" within the meaning of § 191.769(5), R.S.Mo.
5. Before City of Kansas City Ordinance No. 080073 went into effect on June 21, 2008, Ms. Mattivi maintained no non-smoking areas at all in JC's Sports Bar, because Missouri's statewide Clean Indoor Air Act, §§ 191.765 through 191.777, R.S.Mo., permits her not to.
6. When Ms. Mattivi did allow smoking at JC's Sports Bar, she conspicuously posted signs stating that "Nonsmoking areas are Unavailable," within the meaning of § 191.769(5), R.S.Mo.

(L.F. 99-100). The Circuit Court held that because of this stipulation, no evidentiary hearing was necessary. (L.F. 101; Appx. A3). The court heard arguments by counsel on December 12, and took the motion under advisement. (L.F. 101; Appx. A3).

On January 5, 2009, the Circuit Court overruled Appellant's motion and sustained the charge against her. (L.F. 101-02; Appx. A3-4). The court held that the ICAA did not "preempt[] the field" of indoor smoking regulation and thus Respondent "is free to enact and enforce ordinances that go beyond the ICAA." (L.F. 102; Appx. A4).

Three days later, Appellant moved the court to reconsider its order. (L.F. 103). She argued that the court had overlooked and misinterpreted her argument in her Motion to Dismiss: her point had not been that the State had "preempted the field" of indoor smoking regulation, but rather that the Ordinance conflicts with state law because it prohibits her from doing what the state law permits her to do, which in Missouri is a separate question from "field preemption," subject to different standards. (L.F. 103).

At a further hearing on January 16, 2009, the trial court denied Appellant's motion to reconsider. (L.F. 114; Appx. A2). Thereafter, the court found her guilty and sentenced her to pay a fine of \$100.00, plus court costs. (L.F. 114; Appx. A2).

Appellant timely appealed to this Court. (L.F. 115).

### **Point Relied On**

The trial court erred in declaring that City of Kansas City Ordinance No. 080073 is valid and applying that declaration of law so as to convict and sentence Appellant for violating said ordinance *because* said ordinance was and is preempted and invalid *in that* the ordinance prohibits that which the State of Missouri authorizes and permits.

*Morrow v. City of Kansas City*, 788 S.W.2d 278 (Mo. banc 1990).

*City of St. Louis v. Klausmeier*, 213 Mo. 119, 112 S.W. 516 (banc 1908).

*City of St. Louis v. Stenson*, 333 S.W.2d 529 (Mo. App. 1960).

*LDM, Inc. v. Princeton Reg. Health Comm'n*, 336 N.J. Super. 277, 764 A.2d 507  
(L. Div. 2000).

MO. CONST. Art. VI, § 19(a).

§ 71.010, R.S.Mo.

§ 191.769, R.S.Mo.

S.B. 509, 86th Gen. Assem., Reg. Sess. (Mo. 1992).

H.B. 348, 87th Gen. Assem., Reg. Sess. (Mo. 1993).

Op. Mo. Att'y Gen. No. 80-96 (Jan. 12, 1996).

City of Kansas City Ordinance No. 080073.

## Argument

The trial court erred in declaring that City of Kansas City Ordinance No. 080073 is valid and applying that declaration of law so as to convict and sentence Appellant for violating said ordinance *because* said ordinance was and is preempted and invalid *in that* the ordinance prohibits that which the State of Missouri authorizes and permits.

### Standard of Review

Municipal ordinance violation cases such as this are quasi-criminal in nature. *City of Kansas City v. McGary*, 218 S.W.3d 449, 452 (Mo. App. 2006). Guilt must be proven beyond a reasonable doubt, and the rules of criminal procedure apply. *Id.*

Appellant appeals from a judgment against her for violating a municipal ordinance, entered after a bench trial. As in any other court-tried case, this Court reviews such a judgment “under the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).” *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo. App. 2008) (quoting *City of Ash Grove v. Christian*, 949 S.W.2d 259, 261 (Mo. App. 1971)). That is, the judgment must be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*

Appellant argues that the ordinance she was convicted of violating is invalid because it conflicts with state law. Whether an “ordinance conflicts with state law is a question of law, which the Court reviews de novo.” *State ex rel. Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of the City of St. Ann*, 64 S.W.3d 310, 314 (Mo. banc 2002). The same general rules of construction apply to municipal ordinances as apply to state statutes. *Fleming v. Moore Brothers Realty Co.*, 363 Mo. 305, 251 S.W.2d 8, 15 (1952).

In interpreting a statute, the Court must ascertain the intent of the legislature from the language used, give effect to that intent, and consider the words used in their plain and ordinary meaning. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997). When a statute specifically defines a phrase or term, that definition “is binding on the court and must be given effect.” *Matthews v. City of Jennings*, 978 S.W.3d 12, 15 (Mo. App. 1998). If an ordinance imposes a penalty, it is “strictly construed against the municipality and will not be extended by implication.” *McGary*, 218 S.W.3d at 452.

The parties entered into a stipulation before the trial court as to all the material facts in this case. Therefore, “a pure question of law is presented and” the Court’s review is *de novo*. *City of Kansas City v. Dudley*, 224 S.W.3d 762, 763 (Mo. App. 2008).

\* \* \*

In Missouri, any municipal ordinance prohibiting something a state law expressly or implicitly permits conflicts with that state law and, therefore, is preempted and void. The State of Missouri’s indoor smoking law singles out and authorizes any licensed bar or billiard parlor to maintain no nonsmoking areas indoors, so long as signs warning that “Nonsmoking Areas are Unavailable” are conspicuously posted. Conversely, Respondent’s ordinance prohibits anyone in control of any bar or billiard parlor from allowing any tobacco smoking therein at all. Appellant was convicted and sentenced for violating this ordinance by allowing patrons to smoke inside an establishment that the parties stipulate is a licensed bar and billiard parlor posting the signage required by the state law. Does Respondent’s ordinance prohibit what Missouri’s indoor smoking law expressly or implicitly permits?

**I. Under § 71.010, R.S.Mo., an ordinance of Respondent Kansas City is preempted and invalid when it conflicts with a state law on the same subject by prohibiting what the state law permits.**

Kansas City is a constitutional charter city of the State of Missouri. *Levinson v. City of Kansas City*, 43 S.W.3d 312, 322-23 (Mo. App. 2001). This status means that Kansas City has “all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied ... by statute.” MO. CONST. Art. VI, § 19(a); (Appx. A16). Accordingly, while the powers conferred upon Kansas City are far-reaching, they are not without limitation: where the General Assembly has limited Kansas City’s power or denied it a power entirely, the Constitution provides that it lacks authority to exercise that power. *Levinson*, 43 S.W.3d at 322-23. Cities are a product of the General Assembly and therefore must yield to the State’s requirements. *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986).

Section 71.010, R.S.Mo. (Appx. A17), located in the chapter titled “Provisions Relative to All Cities and Towns,” reads in its entirety as follows:

Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject.

As a consequence of this statute, which has been in effect without amendment for 120 years, *see* § 1902, R.S.Mo. (1889), Missouri denies all its cities, including Kansas City, the power to pass any ordinances that are inconsistent with a state law.

As such, all municipal ordinances in Missouri, even those enacted by a constitutional charter city, must “be construed in light of § 71.010.” *City of St. Louis v. Stenson*, 333 S.W.2d 529, 535 (Mo. App. 1960). To this end, an ordinance of Kansas City “must be in harmony with the general law of the state and is void if in conflict.” *Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. banc 1990). If Kansas City enacts an ordinance that is in conflict with a state law on the same subject, the ordinance is preempted and void. *Id.*

To determine whether a city’s ordinance is preempted for conflict with state law, Missouri courts consistently and broadly apply this bright-line test: “whether the ordinance ‘permits what the statute prohibits’ or ‘prohibits what the statute permits.’” *Id.* (quoting *Vest v. City of Kansas City*, 355 Mo. 1, 194 S.W.2d 38, 39 (1946); *State ex rel. Hewlett v. Womach*, 355 Mo. 486, 196 S.W.2d 809, 812 (banc 1946)); *see Morrow*, 788 S.W.2d at 281. “When the *expressed or implied* provisions of each are inconsistent and in irreconcilable conflict, then the statute annuls the ordinance.” *Page Western, Inc. v. Community Fire Protection Dist. of St. Louis County*, 636 S.W.2d 65, 67 (Mo. banc 1982) (citing *City of St. Louis v. Klausmeier*, 213 Mo. 119, 112 S.W. 516, 518-19 (banc 1908)) (emphasis added). This is because “[t]he powers granted a municipality must be exercised in a manner not contrary to the public policy of the state and any provisions in conflict with prior or subsequent state statutes must yield.” *Morrow*, 788 S.W.2d at 281.

Stated concisely, then, Missouri’s doctrine of conflict preemption mandated by § 71.010 is this: “If a local law either prohibits what state law allows, or allows what state law prohibits, then a local law is in conflict with the state law and, therefore, preempted.” *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. 1999). As such, if an ordinance of Kansas City prohibits what a statute of the State of Missouri expressly or implicitly permits, the ordinance is void *ab initio*. *Morrow*, 788 S.W.2d at 281.

This doctrine applies equally to the Indoor Clean Air Act, §§ 191.765 through 191.777, R.S.Mo. (hereinafter “ICAA”), as it does to any other state law on any subject. Enacted in 1992, the ICAA comprehensively regulates where and under what circumstances tobacco smoking may occur inside “public places.” (Appx. A27). The State defines a “public place” as “any enclosed indoor area used by the general public or serving as a place of work.” §191.765(5), R.S.Mo.; (Appx. A18).

In 1996, a State Senator asked the Attorney General for an opinion as to whether the ICAA “preempt[s] more stringent regulation of smoking by fourth class cities.” Op. Mo. Att’y Gen. No. 80-96 (Jan. 12, 1996); (Appx. A34). In his response, the Attorney General concluded that while the ICAA does not expressly preempt all more stringent regulation of indoor smoking by local governments, and it is not so pervasive that it preempts all local regulation of the field of indoor smoking in general, nonetheless any local ordinance regulating indoor smoking still “must not attempt to prohibit what [the ICAA] prohibits or prohibit what [the ICAA] permits.” *Id.*; (Appx. A35-36).

Thus, under § 71.010, if an ordinance of Respondent Kansas City also regulates smoking inside places to which the public is permitted or that serve as a place of work but prohibits what the ICAA permits, then the ordinance is preempted and void.

Appellant appeals from a judgment of conviction and sentence for violating City of Kansas City Ordinance No. 080073 (hereinafter “the Ordinance”). (L.F. 48-57; Appx. A5-15). The Ordinance prohibits any person in control of an enclosed place in Kansas City to which the public is invited or that serves as a place of employment, including such bars and billiard parlors, from allowing any tobacco smoking inside that place whatsoever, under penalty of a fine. (Appx. A8-12). Appellant violated it by allowing patrons to smoke inside JC’s Sports Bar, a small bar and billiard parlor where she was in charge at the relevant time and where the owner had posted conspicuous signs stating “Nonsmoking Areas are Unavailable.”

Kansas City’s ordinance does exactly what the Attorney General warned against: in completely prohibiting any person in control of any bar or billiard parlor from allowing any smoking indoors at all, it plainly prohibits what the ICAA permits. Using plain and unambiguous language, in § 191.769 the ICAA permits a bar or billiard parlor like JC’s Sports Bar to post signs conspicuously warning “Nonsmoking Areas are Unavailable” and thereby allow smoking indoors without limitation. The General Assembly expressly contemplated that a licensed bar or licensed billiard parlor would post these signs so as to be free to maintain no indoor nonsmoking section at all. The obvious, intended effect of § 191.769 is to permit a person in control of such a bar or billiard parlor – like Appellant – to allow smoking unreservedly therein, as if the place were a private residence.

**II. In § 191.769, R.S.Mo., the ICAA permits Appellant to allow smoking freely inside JC’s Sports Bar.**

**a. When a prohibitory state statute expressly exempts some specific conduct from all of its restrictions, it is construed to permit that conduct.**

In conflict preemption cases such as this, the “permission” granted by a state statute is construed very broadly. This is because it is “the *expressed or implied* provisions of” both the ordinance and the statute that are at issue. *Page Western*, 636 S.W.2d at 67 (citing *Klausmeier*, 112 S.W. at 518-19) (emphasis added). If a state law permits some conduct in any way, even implicitly, then a city lacks the authority to prohibit that conduct entirely. *Id.*

Even where a state law merely contemplates a particular thing’s existence, Missouri courts consistently hold that it permits that thing to exist, such that a city has no authority to prohibit the thing entirely. *See, e.g., City of Meadville v. Caselman*, 240 Mo. App. 1220, 227 S.W.2d 77, 80 (1950) (where state law contemplates the existence of pool tables, a city cannot absolutely prohibit businesses from having pool tables); *Hagerman v. City of St. Louis*, 365 Mo. 403, 283 S.W.2d 623, 629-30 (1955) (where state law contemplates auctions of general merchandise, a city cannot entirely prohibit auctioneers from selling jewelry); *State ex rel. Burnau v. Valley Park Fire Protection Dist. of St. Louis County*, 477 S.W.2d 734, 736 (Mo. App. 1972) (where state law contemplates the sale of fireworks, a local government cannot absolutely prohibit fireworks from being sold); *Page Western*, 636 S.W.2d at 67-68 (where state law contemplates the retail sale of gasoline in self-service pumps, a city cannot absolutely

prohibit petroleum retailers from selling self-serve gasoline); *State ex rel. Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of the City of St. Ann*, 64 S.W.3d 310, 313-14 (Mo. banc 2002) (where state law contemplates the existence of “payday loan” businesses, a city cannot totally zone them out of existence).

Similarly, when a state statute is generally prohibitory but specifically exempts certain conduct it otherwise would prohibit, the State of Missouri has expressly contemplated that the conduct would exist and thus permits it. *See, e.g., Stenson*, 333 S.W.2d at 535-36; *Klausmeier*, 112 S.W. at 518-19. This is because,

In order to be a conflict of any kind, two things must of necessity exist, and when it is contended that there is a conflict between two laws both must contain either express or implied provisions which are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there can be no conflict between them.

*Klausmeier*, 112 S.W. at 518. A prohibitory statute expressly exempting specific conduct from its restrictions is not silent. *Id.* Instead, it constitutes positive law permitting that conduct, such that a city has no authority to prohibit it entirely. *Id.* at 518-19; *Stenson*, 333 S.W.2d at 535-36.

In *Klausmeier*, an ordinance of the City of St. Louis prohibited the sale of “skimmed milk” that did not contain at least 10.5% milkfat. Conversely, a state statute prohibited the sale of “skimmed milk” that did not contain contain at least 9.25% milkfat. 112 S.W. at 518. The Supreme Court held that this portion of St. Louis’s ordinance was in conflict with the state law and therefore void, because “a person might sell skimmed

milk containing 9.25 per cent of solids, as prescribed by the State law, and still be guilty of an offense under the ordinance. In other words, the ordinance denounces that to be a crime which the statute authorizes to be done.” *Id.* at 519. “To hold otherwise would be to subject the statute of the State to the operation of the ordinance of the city.” *Id.* As such, the Court held that this portion of St. Louis’s ordinance was “in direct conflict with the acts of the Legislature mentioned,” and was “repealed by necessary implication.” *Id.*

This Court reached the same result in *Stenson*, 333 S.W.2d at 529. In that case, St. Louis had enacted an ordinance prohibiting anyone from driving a vehicle or a combination of vehicles having an overall length of more than 33 feet on a particular public road, Riverview Boulevard. 333 S.W.2d at 531. Conversely, a state statute provided that “no combination of [motor] vehicles coupled together of a total or combined length ... in excess of forty-five feet shall be operated on [the] highways [of this state].” *Id.* at 533. The appellant drove a tractor-trailer greater than 33 feet long but less than 45 feet long on Riverview Boulevard, was convicted of violating St. Louis’s ordinance, and was sentenced to pay a fine. *Id.* at 531.

On appeal, citing and applying *Klausmeier*, the Court held that by expressly exempting the operation of a combined vehicle with a length of 45 feet or less from its otherwise prohibitory statute, the State of Missouri had “authorized” the use of such vehicles on public roads. *Id.* at 534. “Absent any statutory or ordinance regulation, commercial vehicles and combinations of same of any weight, height, or length would be permitted to use the highways of the City of St. Louis.” *Id.* But, since the “State of Missouri has seen fit through [the state statute] to prohibit the operation on its highways

of a combination of vehicles that exceed 45 feet in length,” thus the “State of Missouri has spoken and any attempt by ordinance to lower that limit would be in conflict with” the state statute. *Id.* Accordingly, the court held that St. Louis’s ordinance violated § 71.010 and was invalid, because it “prohibits the driving of certain vehicles over the designated parts of Riverview Boulevard which the statute permits to be done.” *Id.* at 534-35.

In contrast, only where a prohibitory state statute simply states the elements of a criminal offense without exempting anything is the doctrine of conflict preemption not invoked when an ordinance requires more. For,

where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective.

*City of Kansas City v. LaRose*, 524 S.W.2d 112, 117 (Mo. banc 1975).

In *LaRose*, for example, the defendant was found guilty of hindering and interfering with a police officer in the discharge of his official duties, in violation of a Kansas City ordinance. *Id.* at 113. A state statute proscribed the same conduct. *Id.* at 117. The statute required that the *actus reus* be “knowingly and willfully done,” but the

ordinance did not. *Id.* This difference in *mens rea* was the only dissimilarity between the ordinance and the statute. *Id.* The Court upheld the ordinance because it “has simply gone further and prohibited interference in cases where willfulness is not shown.” *Id.* Violation of the purely prohibitory statute also violated the purely prohibitory ordinance, and conflict preemption did not apply. *Id.*

The ICAA is akin to the statutes at issue in *Klausmeier* and *Stenson*, rather than *LaRose*. Unlike the statute in *LaRose*, the ICAA is not purely prohibitory. Although most of the ICAA greatly restricts smoking indoors in places open to the public or that serve as a workplace, the General Assembly enacted § 191.769 expressly to carve out a few areas, including private homes, as places authorized to allow smoking indoors without reservation. The parties stipulate that JC’s Sports Bar, where Appellant allowed smoking in violation of the Ordinance, is one of these places.

**b. In § 191.769, the ICAA expressly exempts JC’s Sports Bar from all its restrictions, permitting smoking to be allowed freely therein.**

As mentioned above, the ICAA broadly defines a “public place” as “any enclosed indoor area used by the general public or serving as a place of work.” § 191.765(5), R.S.Mo.; (Appx. A18). Among its nonexclusive list of examples of “public places” are “any retail or commercial establishment.” *Id.* It provides that “[a] person shall not smoke in a public place or in a public meeting except in a designated smoking area.” § 191.767(1), R.S.Mo.; (Appx. A20). “A smoking area may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance or regulation.” § 191.767(2);

(Appx. A20). “No public place shall have more than thirty percent of its entire space designated as a smoking area.” § 191.767(3); (Appx. A20).

Under the ICAA, a “person having custody or control of a public place” must “make reasonable efforts to prevent smoking” therein by posting appropriate, easily viewable, and un-obscured “signs indicating no-smoking or smoking area and [must] arrange seating accordingly.” § 191.771(1); (Appx. A22). He or she must “[a]rrange seating and utilize available ventilation systems and physical barriers to isolate designated smoking areas” and “[m]ake a reasonable request of persons smoking to move to a designated smoking area.” § 191.771(2) through (3); (Appx. A22).

A person who smokes in an area where the ICAA prohibits smoking is guilty of an infraction. § 191.773(1); (Appx. A23). Similarly, “A proprietor or other person in charge of a public place or public meeting who permits, causes, suffers or allows a person to smoke” in an area where the ICAA prohibits smoking is also guilty of an infraction. § 191.773(2); (Appx. A23).

Then, however, in a separate statute, § 191.769 (Appx. A21), which reads in its entirety as follows, the ICAA declares:

The following areas are not considered a public place:

- (1) An entire room or hall which is used for private social functions, provided that the seating arrangements are under the control of the sponsor of the function and not of the proprietor or other person in charge;
- (2) Limousines for hire and taxicabs, where the driver and all passengers agree to smoking in such vehicle;

(3) Performers on the stage, provided that the smoking is part of the production;

(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, bowling alleys and billiard parlors, which conspicuously post signs stating that “Nonsmoking Areas are Unavailable”;*

*(6) Private residences;* and

(7) Any enclosed indoor arena, stadium or other facility which may be used for sporting events and which has a seating capacity of more than fifteen thousand persons.

(Emphasis added).

The effect of this § 191.769 is that “bars” and “billiard parlors” posting conspicuous signs warning that “Nonsmoking Areas are Unavailable” are thereby exempt from all restrictions on indoor smoking. They are able to do exactly what their state-mandated signs say: make any nonsmoking areas “unavailable.” The State of Missouri plainly treats the places listed in § 191.769 as private homes, authorizing them to allow smoking indoors freely. Although most of the areas listed in § 191.769 are enclosed indoor areas used by the general public or serving as a place of work ordinarily falling under the ICAA’s definition of “public place,” if such a place meets this section’s

qualifications then it is “not considered a public place.” It is not an infraction to smoke or allow smoking anywhere in these areas.

Consequently, unlike the vast majority of places in Missouri used by the general public or serving as a place of work, a person having custody or control of a bar or billiard parlor where signs are conspicuously posted stating “Nonsmoking Areas are Unavailable” is alleviated of the ICAA’s requirements to designate smoking and nonsmoking sections, make reasonable efforts to prevent smoking therein, and post “signs indicating no-smoking or smoking area.” Indeed, her allowed and required signage indicates something completely different: nonsmoking areas are entirely *unavailable*. She does not face the ICAA’s requirements to arrange seating and utilize available ventilation systems and physical barriers to isolate designated smoking areas. The smoking areas of covered bars and billiard parlors are not limited to “no more than thirty percent.” Instead, the effect of § 191.769 is that the bars and billiard parlors it covers may allow smoking in *100%* of their enclosed space, like private homes, which the statute places in the same class.

The ICAA defines a “bar” as “any licensed establishment which serves liquor on the premises for which not more than ten percent of the gross sales receipts of the business are supplied by food purchases, either for consumption on the premises or elsewhere.” § 191.765(1); (Appx. A18). The parties stipulate that JC’s Sports Bar, where Appellant allowed patrons to smoke indoors in violation of the Ordinance, is a “bar” within the meaning of § 191.769. (L.F. 99).

Although the ICAA does not define the term “billiard parlor,” that term plainly refers to an establishment that maintains licensed pool tables it holds out for its customers to use. Chapter 318, R.S.Mo., titled “Pool Tables,” promulgates a comprehensive regulatory system for commercial, coin-operated pool tables, which must be licensed with local political subdivisions. Any business establishment that operates licensed, commercial pool tables under Chapter 318 and holds them out for the public to use is a “billiard parlor” within the plain meaning of that term.

Indeed, in §§ 12-1 and 12-2 of its Code of Ordinances, Respondent Kansas City itself adopts this definition of “billiard hall.” (L.F. 63-66). Section 12-1(a) states, “No person shall keep or operate a billiard or pool hall ... open to public patronage within the limits of the city without first securing and having in effect a license from the commissioner of revenue to operate such enterprise.” (L.F. 64). That section then refers the reader to the license fees for billiard tables and pool tables set forth in §§ 40-76 and 40-138, which in turn describes those licenses respectively as the “license required for billiard halls.” (L.F. 65-68). JC’s Sports Bar maintains commercial pool tables and is properly licensed to do so. (L.F. 98). Accordingly, the parties stipulate that JC’s Sports Bar is a “billiard parlor” within the meaning of § 191.769. (L.F. 99).

Appellant therefore allowed smoking in a place that is a “bar” and “billiard parlor” under § 191.769. Additionally, the parties stipulate that the owner of JC’s Sports Bar conspicuously posted signs stating “Nonsmoking Areas are Unavailable.” (L.F. 99). The parties further stipulate that because of this status, the owner of JC’s Sports Bar “maintained no non-smoking areas at all in JC’s Sports Bar, because the Clean Indoor Air

Act, §§ 191.765 through 191.777, R.S.Mo., *permits* her not to.” (L.F. 99) (emphasis added).

Section 191.769 singles out the few places where the State of Missouri grants the proprietor an absolute privilege to decide her own indoor smoking policy. The places where smoking can be allowed indoors freely are limited to those places alone. Consequently, as in *Klausmeier* and *Stenson*, the ICAA must be construed by its plain and unambiguous meaning to permit the places specifically listed in § 191.769 to allow smoking indoors, without limitation: their maximum allowed indoor smoking area is 100%. It thus comes as no surprise that “private residences” are among the places listed. Indeed, Respondent itself agrees that § 191.769 permits the owner of JC’s Sports Bar to maintain no nonsmoking areas therein. (L.F. 99).

Moreover, certain places listed in § 191.769, such as bars and billiard parlors like JC’s Sports Bar, are required to be particularly licensed by the State in order to operate lawfully in the first place. Effectively, in these places, the ICAA makes the privilege of allowing smoking freely indoors into an extension of the other privileges given in their operating licenses.

In Missouri, to operate lawfully as a “bar” under the ICAA – a “licensed establishment which serves liquor on the premises for which not more than ten percent of the gross sales receipts of the business are supplied by food purchases” – an establishment first must be appropriately licensed by the State and locally to sell intoxicating liquor at retail by the drink. § 311.050, R.S.Mo. Through the ICAA, any establishment properly licensed to sell liquor at retail by the drink that fits the additional

requirements that it (1) receive no more than 10% of its revenue from food purchases and (2) post the appropriate signage is written out of all restrictions on allowing smoking indoors, and thus is authorized to allow smoking indoors freely.

The same is true for billiard parlors. In Missouri, to operate lawfully as a billiard parlor, a “keeper[] of billiard tables” first must obtain the appropriate license, or else commits an infraction. §§ 318.010 and 318.080, R.S.Mo. Through the ICAA, any establishment properly licensed to operate as a billiard parlor that meets the express additional requirement of posting the appropriate warning signage is expressly authorized to allow smoking indoors freely.

The logical conclusion to be gleaned from § 191.769 is that the General Assembly intended to exclude qualified, licensed bars and billiard parlors, as well as the other facilities, establishments, and activities specifically set forth in that statute, from any and all smoking regulations, including the mere requirement that they even establish a nonsmoking area. Plainly, as with the state statutes at issue in *Stenson* and *Klausmeier* that authorized their specified conduct through express exemptions from prohibitory statutes, § 191.769 authorizes smoking to be allowed throughout the places singled out therein. Those places, including JC’s Sports Bar, are permitted to allow smoking freely, without any limitation whatsoever.

Respondent therefore has criminalized Appellant under its Ordinance for allowing patrons to smoke inside a licensed establishment that meets Missouri’s explicit qualifications to be treated like a private home and allow smoking freely indoors. Section 71.010 and its consequential doctrine of conflict preemption exist to prevent just

this conundrum. Kansas City's ordinance prohibits what the ICAA permits. Absent some other specific provision of law manifesting the General Assembly's intent to delegate or reserve to localities the authority to supersede § 191.769, Kansas City's ordinance must yield.

**III. No provision of the ICAA manifests any intent of the General Assembly to delegate or reserve to any city the authority to supersede § 191.769.**

Conflict preemption functions to preempt a municipality's authority to prohibit conduct expressly or implicitly permitted by a state statute "unless a clear intent to the contrary is manifest" in the state law. 62 C.J.S. *Mun. Corps.* § 140 (2008). That is, some state statutes contain an "anti-preemption clause" expressly delegating or reserving to local governments the power to enact more stringent regulations than the state law on the same subject. *See, e.g.,* § 311.090.1, R.S.Mo. (in placing requirements on business to obtain liquor licenses, cities may require more than the statewide Liquor Control Law).

If in the ICAA the General Assembly manifested an intent to delegate or reserve to localities the authority to supersede § 191.769 and absolutely prohibit the places listed therein from allowing any smoking at all, then the doctrine of conflict preemption would not apply. Because a city is "a creature of the legislature," however, "Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation." *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. banc 1977) (quoting *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975)).

The three pieces of legislation that created the ICAA contain several references to local governments passing laws on the subject of indoor smoking. None of these

provisions, however, manifest any intent by the General Assembly – and certainly not beyond a reasonable doubt – to allow localities to supersede § 191.769 and enact total prohibitions on allowing smoking in the places the ICAA singles out in that section, like private residences, as permitted to allow smoking indoors freely.

**a. The ICAA authorizes cities to enact more stringent regulation only of the tobacco purchase age and smoking in schools.**

The legislation that first created the ICAA, Senate Bill 509, 86th Gen. Assem., Reg. Sess. (Mo. 1992) (Appx. A27-32), included three disconnected sets of regulations regarding tobacco smoking, which later were codified separately.

The first five sections of S.B. 509 comprise the portion of the ICAA at issue in this case that are discussed extensively above. They control where and under what circumstances tobacco smoking can occur in public places. (Appx. A27-30). The Reviser of Statutes codified these sections at §§ 191.765 through 191.773, R.S.Mo. Chapter 191 generally deals with “Health and Welfare.” The General Assembly has never amended the text of these sections. Section 191.769 was enacted as § 3 of this Act. (Appx. A29).

The second regulation, § 6 of S.B. 509, deems it generally “an improper employment practice” in Missouri for an employer to retaliate against any individual because that individual “uses lawful alcohol or tobacco products off the premises ... during hours when such individual is not working for the employer ...” (Appx. A30). The Reviser codified this section at § 290.145, R.S.Mo., under the chapter containing statutes covering “Wages, Hours, and Dismissal Rights.”

The final set of regulations in S.B. 509, §§ 7 through 14, enacted Missouri's current minimum purchase age for tobacco. (Appx. A30-32). Those provisions are codified at §§ 407.925 through 407.932, R.S.Mo., under the chapter concerning "Merchandising Practices."

One year after S.B. 509 became law, the State enacted House Bill 348, 87th Gen. Assem., Reg. Sess. (Mo. 1993) (Appx. A33), which added three new sections to the end of the Chapter 191 public smoking portion of the ICAA. These separately regulated smoking in schools, school buses, and licensed childcare facilities. (Appx. A33). They are codified at §§ 191.775 through 191.777, immediately after S.B. 509's first five sections. (Appx. A24-26).

Both S.B. 509 and H.B. 348 each contained an anti-preemption clause, codified today at §§ 407.932 and 191.777, R.S.Mo., respectively. Both of these provisions, however, expressly limit their effect to other portions of the ICAA besides the indoor smoking provisions at issue in this case.

The first of the two anti-preemption clauses began as § 14 of S.B. 509. (Appx. A32). It is codified at § 407.932, at the end of the portion of the ICAA enacting the minimum purchase age for tobacco. It stated, "Nothing in sections 7 to 14 of this act" – the sections containing the minimum purchase age laws – "shall prohibit local political subdivisions from enacting more stringent ordinances or rules." (Appx. A32). Today, this statute provides, "Nothing in sections 407.925 to 407.932 shall prohibit local political subdivisions from enacting more stringent ordinances or rules." § 407.932.

S.B. 509, however, contained no anti-preemption clause covering *the rest* of the ICAA enacted through that bill – that is, the first five sections containing §§ 191.765 through 191.773, R.S.Mo., the portion at issue in this case. The General Assembly easily could have written S.B. 509’s anti-preemption clause so as to cover §§ 191.765 through 191.773: “Nothing in this act shall prohibit local political subdivisions from enacting more stringent ordinances or rules.” But it chose not to do so. It specifically limited the manifestation of its intent to authorizing a city to have total local control only over its minimum tobacco purchase age laws, rather than its indoor smoking laws.

The second anti-preemption clause was § 3 of H.B. 348. (Appx. A33). As mentioned above, this legislation added to the ICAA the two §§ 191.775 and 191.776 prohibiting smoking in schools, school buses, and childcare centers one year after the original ICAA was passed. (Appx. A33). This section stated, “Nothing in sections 1 and 2 of this act shall prohibit local political subdivisions or local boards of education from enacting more stringent ordinances or rules.” (Appx. A33). Today, it is codified at § 191.777, which states, “Nothing in sections 191.775 and 191.776 shall prohibit local political subdivisions or local boards of education from enacting more stringent ordinances or rules.” Once again, the General Assembly easily could have written this anti-preemption clause to cover the rest of the ICAA, including § 191.769. Again, it deliberately chose not to.

Plainly, it was not the manifest intent of the General Assembly, as expressed through the ICAA’s two anti-preemption clauses, to set aside the doctrine of conflict preemption as it applies to §§ 191.765 through 191.773, which are at issue here. Those

clauses cannot be construed to give cities the authority to prohibit smoking outright in the places that § 191.769 permits to allow smoking indoors freely. The General Assembly only saw fit to allow cities to supersede the ICAA’s provisions governing the minimum tobacco purchase age and smoking in schools. It left the rest of the ICAA regulating indoor smoking untouched.

**b. Another provision of the ICAA alludes to cities prohibiting smoking in areas that *are* considered public places, but does not affect areas “not considered a public place,” like JC’s Sports Bar.**

Outside of the anti-preemption clauses in §§ 407.932 and 191.777, another provision of the ICAA, § 191.767.2 (Appx. A20), refers to local government regulation of smoking. It states, “A smoking area may be designated by persons having control of public places, except in places in which smoking is prohibited by the fire marshal or by other law ordinance or regulation.” § 191.767.2; (Appx. A20).

This provision contemplates ordinances prohibiting smoking in “public places.” But this should not seem out of place, for as the Attorney General observed, the ICAA does not expressly or implicitly preempt cities from regulating indoor smoking in general. Op. Mo. Att’y Gen. No. 80-96, *supra*; (Appx. A35-36). Section 191.767.2 reinforces that the permission given to places that *are* considered public places is not absolute, but rather is contingent on what regulations other bodies may wish to enact.

For instance, this clause would prevent a place that the ICAA *does* consider to be a “public place”, such as an indoor shopping mall, from claiming that an ordinance prohibiting smoking inside shopping malls conflicts with state law because state law

provides that “a smoking area may be designated by persons having control of public place.” Instead, § 191.767.2 adds a qualifier that, in public places – those areas that the ICAA requires to maintain at least 70% of their enclosed area as nonsmoking in the first place – smoking might be prohibited by a municipal ordinance, the fire marshal, or some other regulation.

But this provision says nothing of the places that § 191.769 expressly deems “are not considered a public place.” Rather, it principally deals with designating smoking and nonsmoking sections, a requirement that § 191.769 explicitly alleviates places like JC’s Sports Bar from following. While § 191.767.2 arguably may contemplate a city prohibiting smoking in any place *not* listed in § 191.769, it plainly does not touch private residences and other places like JC’s Sports Bar that are treated the same, where the ICAA’s permission to allow smoking without limitation is absolute. The plain language “A smoking area may be designated by persons having control of public places, except in places in which smoking is prohibited by ... ordinance” gives no sign that the General Assembly intended to authorize cities to enact outright prohibitions on smoking in the places like JC’s Sports Bar that state law provides “are not considered a public place” and thus specially qualify as being permitted to allow smoking indoors freely.

Addressing this provision, the Attorney General observed:

The [ICAA] regulates smoking in public places. The legislature obviously considered the possibility of a local government body more strictly regulating smoking when it enacted § 191.767.2 ... Here, the [ICAA] does not limit regulation for all cases to its own prescriptions but rather leaves

*some* flexibility for local governing bodies to shape their own smoking regulations.

Op. Mo. Att’y Gen. No. 80-96, *supra* (emphasis added); (Appx. A35).

Accordingly, the reference in § 191.767.2 to cities prohibiting smoking in “public places” bore nothing on the Attorney General’s ultimate conclusion as to conflict preemption: “no provision of the [ICAA] ... prohibits a ... city from enacting a more stringent ordinance that regulates smoking. However, any such ordinance must not attempt to permit what [the ICAA] prohibits or prohibit what [the ICAA] permits.” *Id.*; (Appx. A36).

The brief reference in § 191.767.2 to cities prohibiting smoking in public places manifestly is not an anti-preemption clause giving cities a specific authorization to prohibit smoking entirely in the places that “are not considered a public place” under § 191.769. The ICAA already contains two anti-preemption clauses, wherein the General Assembly expressly limited a city’s authority to supersede that legislation to other portions besides its indoor smoking provisions. If the General Assembly had intended the ICAA to authorize cities to enact ordinances absolutely prohibiting smoking in the areas permitted to allow smoking freely in § 191.769, it would have manifested that intent by changing a few simple words in one of the ICAA’s two actual anti-preemption clauses, §§ 407.932 and 191.777. After all, the function of an anti-preemption clause is to manifest precisely that intent. 62 C.J.S. *Mun. Corps.* at § 140.

The sentence “A smoking area may be designated by persons having control of public places, except in places in which smoking is prohibited by ... ordinance” cannot

reasonably be construed to contemplate that a municipal ordinance would prohibit smoking in places like JC's Sports Bar, which expressly "are not considered a public place." The language of this provision does not delegate or reserve to cities what the General Assembly purposely chose not to provide in the ICAA's anti-preemption clauses.

Unequivocally, no provision of the ICAA – neither the anti-preemption clauses in §§ 407.932 or 191.777, nor § 191.767.2 contemplating ordinances prohibiting smoking in "public places" – undermines the doctrine of conflict preemption as it applies to the ICAA and the permission given in § 191.769 to Appellant and her employer to allow smoking freely inside JC's Sports Bar.

**IV. The Ordinance prohibits allowing any smoking inside JC's Sports Bar, in direct conflict with § 191.769.**

The ICAA permits smoking to be allowed freely inside a bar or billiard parlor, as long as signs are conspicuously posted stating "Nonsmoking Areas are Unavailable." In this case, the parties agree that Appellant allowed patrons to smoke inside just such a place. Nonetheless, Respondent Kansas City has held Appellant criminally liable under the Ordinance for doing exactly what the ICAA specifically permits her to do. Under § 71.010, Respondent has no authority to prosecute Appellant for allowing smoking inside JC's Sports Bar.

Appellant anticipates that Respondent will attempt to recast her argument as one of plain preemption. That is not her argument. This is a *conflict* preemption case. Appellant is not stating that the ICAA preempts Respondent from merely restricting or regulating indoor smoking in Kansas City in general. Rather, Respondent must be

consistent with the law of Missouri and cannot *totally prohibit* smoking in a place that state law expressly allows to post a sign warning “Nonsmoking Areas are Unavailable” and thereby do exactly that: maintain no nonsmoking areas. In this case, a direct conflict exists between Missouri’s governing law and the Ordinance.

Appellant certainly is *not* arguing that Kansas City cannot regulate and control by ordinance smoking inside public places generally. Rather, Kansas City cannot illegally enact an ordinance entirely prohibiting a place permitted by § 191.769 to allow smoking indoors freely from allowing any smoking indoors whatsoever. It possibly would be a different situation if Kansas City’s Ordinance did not absolutely prohibit all such places from allowing any smoking at all, but instead required them to meet some extra requirement in order to do so, such as obtaining a special local license or posting extra signage. But that is not the case here. Instead, the Ordinance totally prohibits any such place in Kansas City from allowing any smoking anywhere indoors at all.

By virtue of the ICAA, the State of Missouri has sought to regulate smoking indoors, specifically authorizing establishments like JC’s Sports Bar in § 191.769 to post appropriate warning signs so as to maintain no indoor nonsmoking areas. To the extent that MO. CONST. Art. VI, § 19(a) confers powers on Kansas City to enact ordinances regulating and controlling smoking in public places generally, such ordinances remain subject to the requirement of § 71.010 that they be consistent with state law. The State’s indoor smoking law, the ICAA, plainly permits places like JC’s Sports Bar and private residences to allow smoking indoors freely, as long as the requirements of § 191.769 are

met. Hence, Kansas City's wholesale prohibition of such places from allowing any smoking indoors at all blatantly and unlawfully conflicts with state law.

This facts and law of this case mirror those in *LDM, Inc. v. Princeton Reg. Health Comm'n*, wherein the Superior Court of New Jersey held that the City of Princeton's indoor smoking ordinance was void because it prohibited what New Jersey's indoor smoking law permitted. 336 N.J. Super. 277, 764 A.2d 507, 531 (L. Div. 2000). New Jersey uses the same bright-line test for conflict preemption as Missouri: "an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes." *Id.* at 515. The City of Princeton enacted a similar ordinance to the one at issue in this case, absolutely prohibiting all enclosed public places from allowing any smoking indoors. *Id.* at 512. Only private residences, hotels and motels, and retail tobacco stores were excluded from the ordinance's blanket prohibition. *Id.* at 512.

Like the ICAA, New Jersey's indoor smoking statute at the time mandated that enclosed "public places" maintain designated nonsmoking areas indoors. *Id.* at 523. Like § 191.767.2, one section of the New Jersey statute provided that designated smoking areas "may be permitted in any indoor public place ... except where smoking is prohibited by municipal ordinance ..." *Id.* The statute generally defined a "public place" as "any enclosed area to which the public is invited or in which the public is permitted." Then, however, it provided the following: "Race tracks facilities, [licensed] casinos ..., facilities used for the holding of boxing and wrestling exhibitions or performances, football, baseball, and other sporting events facilities, bowling alleys, dance halls, ice and

roller skating rinks and other establishments providing ambulatory recreation are excluded from this definition” of “public place.” *Id.*

The reviewing court noted that because the “Legislature specifically excluded race track facilities, casino licensed facilities ... and a host of other sporting event facilities, bowling alleys and other establishments providing ambulatory recreation” from the restrictions of its indoor smoking statute, the “logical conclusion” was “that the Legislature intended to exclude these facilities, establishments and activities from any and all smoking regulations, including the requirement that they establish nonsmoking areas.” *Id.* at 524. The provision referring to cities prohibiting smoking in “public places” could not apply to these areas. *Id.* Accordingly, the court held that Princeton’s ordinance “conflicts with State law,” *id.* at 527, and was “void and of no force and effect.” *Id.* at 531.

*LDM* is directly on point. As in *LDM*, the Ordinance plainly prohibits Appellant from allowing any smoking in a place the statewide smoking law declares “is not considered a public place” and thus is excluded from any and all smoking regulations, including the mere requirement that it establish nonsmoking areas. The Ordinance prohibits Appellant from doing precisely what state law permits her to do, and therefore was void *ab initio*. Appellant’s conviction and sentence cannot stand.

In *Entm’t Indus. Coal. v. Tacoma-Pierce County Health Dep’t*, the Supreme Court of Washington reached the same conclusion as the New Jersey court in *LDM*, and held a county health board’s indoor smoking resolution invalid because it prohibited what Washington’s indoor smoking law permitted. 153 Wn.2d 657, 105 P.3d 985 (2005).

Like New Jersey, Washington uses the same bright-line test for conflict preemption as Missouri: “A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits.” *Id.* at 987.

The county’s regulation prohibited “all public places, including restaurants, taverns, bars, bowling alleys, and all other enclosed public areas” from allowing any smoking indoors. *Id.* Washington’s indoor smoking law generally mandated that some public places had to be entirely nonsmoking areas, and the proprietors of others could designate smoking and nonsmoking areas. *Id.* Then, it provided the following:

no public place, other than a bar, tavern, bowling alley, tobacco shop, or restaurant, may be designated as a smoking area in its entirety. If a bar, tobacco shop, or restaurant is designated as a smoking area in its entirety, this designation shall be posted conspicuously on all entrances normally used by the public.

*Id.* The state law went on to give “[l]ocal fire departments or fire districts and local health departments” the authority to “adopt regulations as required to implement this chapter.” *Id.*

The court noted that, “In some businesses, like a bar, tavern, bowling alley, tobacco shop, or restaurant, the statute allows an owner to create the entire establishment as a smoking establishment.” *Id.* at 988. Thus, “The resolution, by imposing a complete smoking ban, prohibits what is permitted by state law.” *Id.* “By prohibiting what the statute allows, the Health Board’s resolution is invalid.” *Id.*

Like *LDM*, this Washington case is also directly on point. In some places, like a bar or billiard parlor posting signs warning “Nonsmoking Areas are Unavailable” or a tobacco retailer, the State of Missouri through the ICAA allows the proprietor to create the entire premises as a smoking area. Conversely, by imposing a complete prohibition on any indoor smoking in these same places, the Ordinance prohibits what that statute allows. In so doing, the Ordinance is invalid.

In *Mich. Rest. Ass’n v. City of Marquette*, the Michigan Court of Appeals concluded the same, holding the City of Marquette’s indoor smoking ordinance void because it prohibited what Michigan’s indoor smoking law permitted. 245 Mich. App. 63, 626 N.W.2d 418, 422 (2001). Like New Jersey and Washington, Michigan uses the same bright-line conflict preemption test as Missouri: “whether the ordinance prohibits what state law permits.” *Id.* at 420.

Marquette’s ordinance prohibited any restaurant from allowing any smoking indoors whatsoever. *Id.* at 419. Michigan’s statewide indoor smoking law provided that a “food service establishment” seating less than 50 people “may designate up to 75% of its seating capacity as seating for smokers,” and a larger such establishment “may designate up to 50% of its seating capacity as seating for smokers.” *Id.* A separate Michigan statute authorized cities to pass ordinances regulating food service establishments “to the extent necessary to carry out the responsibility of a local health department.” *Id.* at 421.

The court held that although the State of Michigan thus did give cities the authority to enact local ordinances concerning public health in food service

establishments, nonetheless the state law also gave food service establishments the “right ... to designate a certain percentage of its seating capacity as seating for smokers.” *Id.* at 422. Marquette’s ordinance was “in direct conflict” with this right. *Id.* The court noted that given the state law, “The question whether there should be a total ban on smoking in restaurants must be left to the legislature.” *Id.*

The same is true in this case. Under the ICAA, the State of Missouri gives an establishment that fits the specific licensing and sales qualifications to be a “bar” or “billiard parlor” under § 191.769 and that additionally chooses to post conspicuous signs stating “Nonsmoking Areas are Unavailable” the right to allow smoking freely. The Ordinance is in direct conflict with that right. The question whether there should be a total ban on smoking in bars and billiard parlors must be left to the General Assembly.

Although no Missouri court yet has applied the doctrine of conflict preemption to the ICAA and local smoking restrictions, this case necessitates the same result as *Klausmeier, supra*, and *Stenson, supra*. Those cases also involved municipal ordinances that absolutely prohibited conduct expressly exempted from – and thus permitted by – a prohibitory state statute.

Just as in *Klausmeier*, the portion of Kansas City’s ordinance prohibiting any bar or billiard parlor from allowing any smoking indoors at all is in conflict with the ICAA’s provision permitting a bar or billiard parlor conspicuously to post signs stating “Nonsmoking Areas are Unavailable” so as to allow smoking freely. 112 S.W. at 518. A person might allow smoking in such a bar or billiard parlor, as prescribed by the ICAA, and still be guilty of an offense under the Ordinance. *Id.* at 519. “In other words, the

Ordinance denounces that to be a crime which [the ICAA] authorizes to be done.” *Id.* If it were otherwise, the ICAA would be subject to the operation of the Ordinance. *Id.* As such, the Ordinance “is in direct conflict with” the ICAA, and must be “repealed by necessary implication.” *Id.*

And as in *Stenson*, by expressly and entirely exempting a bar or billiard parlor conspicuously posting signs stating “Nonsmoking Areas are Unavailable” from that ICAA’s otherwise restrictive provisions, the State of Missouri has authorized smoking to be allowed indoors freely in such places. 333 S.W.2d at 534. Absent any statutory or ordinance regulation, smoking could be allowed anywhere in any place. *Id.* But, since the “State of Missouri has seen fit through” the ICAA to provide the places listed in § 191.769 the right to allow smoking within 100% of their enclosed space, “the State of Missouri has spoken and any attempt by ordinance to lower that limit” to 0% would be in conflict with the state statute. *Id.* Just as with St. Louis’s ordinance in *Stenson* that lowered the state’s maximum allowed tractor-trailer length from 45 feet to 33 feet, Kansas City’s Ordinance is invalid under § 71.010 because it lowers an applicable bar or billiard parlor’s maximum allowed indoor smoking area from 100% to 0%. *Id.* at 534-35.

This is not a case like *LaRose*, *supra* at p. 20, in which the state statute at issue is purely prohibitory and lacks any permissive provisions, and a city’s slightly different prohibitory ordinance works in tandem with that statute. Although much of the ICAA is prohibitory, § 191.769 expressly exempts specially qualified places like JC’s Sports Bar from all of its restrictions. Section 191.769 permits these places to maintain no indoor nonsmoking areas at all, as Respondent has stipulated. Kansas City’s Ordinance does not

work in tandem with § 191.769, but rather completely contradicts it. Under that statute, JC's Sports Bar can post signs warning that "Nonsmoking Areas are Unavailable" and therefore maintain no nonsmoking areas. Conversely, Kansas City's Ordinance requires that JC's post only "no smoking" signs and be a nonsmoking area in its entirety.

This also is not a case in which a local ordinance merely supplements or enlarges upon a state statute. In Missouri, an ordinance that "enlarges upon the provision of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirements for all cases to its own prescriptions." *Page Western*, 636 S.W.2d at 68. But while "[a]n ordinance may supplement a state law," it is not a mere supplement "when the expressed or implied provisions of each are inconsistent and in irreconcilable conflict..." *Id.* at 67. When that occurs, "the statute annuls the ordinance." *Id.* As such, where an ordinance "attempts to prohibit precisely what state regulation permits," it "involves more than additional requirements." *Id.* at 68. Instead, it is in conflict with state law and must be held "void and unenforceable." *Id.*

For example, in *Vest v. City of Kansas City*, an ordinance placed stricter requirements on the operation of barbers and barbershops than the relevant state law. 194 S.W.2d at 38-39. The State required that all licensed barbers undergo a medical examination once each year. *Id.* at 39. Kansas City required the same every six months. *Id.* Both laws required medical examinations of licensed barbers, but the ordinance simply required twice as many examinations as the statute. *Id.* Kansas City's ordinance did not prohibit something the statute permitted: "The purpose of the additional examination [was] to enforce the same standard exacted by the statute, namely that a

barber to practice his trade must be free of contagious or infectious diseases.” *Id.* As such, the ordinance was consistent with the statute, and both stood in harmony. *Id.*

But the Ordinance in this case does not merely supplement the ICAA, as the barber examination ordinance did in *Vest*. The ICAA permits bars and billiard parlors to post conspicuous signs stating “Nonsmoking Areas are Unavailable” so as to be authorized to allow smoking indoors without limitation. Conversely, the Ordinance absolutely prohibits all bars and billiard parlors from allowing any smoking indoors at all. That is not a “supplement” or “enlargement” on § 191.769. Instead, the Ordinance attempts to prohibit precisely what § 191.769 permits. The ICAA specifically authorizes a person in control of a qualified establishment like JC’s Sports Bar to allow smoking indoors freely. The Ordinance prohibits the same person from doing the same thing. Appellant has been convicted of doing exactly what the ICAA permits her to do.

The Ordinance therefore must succumb to conflict preemption, like the respective ordinances in the New Jersey, Washington, and Michigan cases discussed above. Whether there should be a total ban on smoking in bars and billiard parlors in Missouri is a question that must be left to the people of this state through their elected representatives in the General Assembly. For now, though, Kansas City’s indoor smoking Ordinance prohibits what Missouri’s indoor smoking law permits, in conflict with that state law, and therefore was and is preempted and invalid. That the trial court held otherwise was error.

This Court should uphold the ICAA and discourage Respondent from illegally ignoring it. The Court should reverse the judgment of conviction and sentence against Appellant for violating City of Kansas City Ordinance No. 080073.

### **Conclusion**

City of Kansas City Ordinance No. 080073 conflicts with state law, in violation of § 71.010, R.S.Mo., and therefore was and is preempted and invalid. It was error for the trial court to declare otherwise. Appellant unjustly has been held criminally liable for engaging in conduct in which the State of Missouri permits her to engage.

This Court should reverse the trial court's judgment of conviction and sentence against Appellant Georgia Jean Carlson for violating Ordinance No. 080073.

Respectfully submitted,

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**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 2007 for word processing. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court’s Rule XLI, and that this brief contains 11,558 words.

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**Certificate of Service**

I hereby certify that on February 26, 2009, I mailed a true and accurate copy and CD-ROM of this Brief of the Appellant and its Appendix to the following:

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