

IN THE MISSOURI COURT OF APPEALS  
FOR THE WESTERN DISTRICT

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WD70576

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CITY OF KANSAS CITY,  
Respondent

v.

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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RESPONDENT'S BRIEF

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## **Jurisdictional Statement**

This case arises within the City of Kansas City on appeal of a trial *de novo* decision of the 16<sup>th</sup> Circuit Court of Jackson County, Missouri. Jurisdiction therefore, lies within this Court.

### **Statement of Facts**

Appellant, as an employee and night manager of a bar in Kansas City, was convicted in Municipal court and again on a trial de novo in the Circuit Court of Jackson County for violating Ordinance No. 080073, Kansas City Code of Ordinances §34-474, by allowing patrons of JC's Sports Bar to smoke cigarettes in a bar open to the public which constituted a place of employment within the definition of such contained in the ordinance.

The ordinance prohibiting smoking in public places was amended on September 25, 2008 by Ordinance Number 080910 (amending §34-475(d)) to permit smoking in tobacco stores so long as steps are taken to prevent the pollution of air within buildings shared by other tenants (*KCMO Ordinance Number 080910*).

### **Point Relied On**

The trial court did not err in declaring that the City of Kansas City's ordinance No. 080073 is valid because the ordinance is not preempted or invalid in that the ordinance prohibits smoking in enclosed public places and places of employment but does not prohibit that which the State of Missouri authorizes and permits.

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

*D.A.B.E., Inc. v. City of Toledo*, 393 F.3d 692 (6<sup>th</sup> Cir. 2005)

## Argument

The trial court did not err in declaring Ordinance Number 080073 valid and convicting the Appellant of violation of the ordinance because the ordinance is a valid exercise of the police powers granted the city and such power is not pre-empted by state statute in that the exclusion of bars seating less than fifty people from the definition of a “public place” under the state statute does not amount to the express or implied grant of a license to permit smoking in any such bar or in any place of employment.

## Standard of Review

The judgment of the trial court 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. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). Appellant does not contest the sufficiency or weight of the evidence, but relies on the proposition that state statutes pre-empt or conflicts with the ordinance in such a way as to render the ordinance invalid.

Appellant asserts that Missouri’s Indoor Clean Air Act (“Act” or “ICAA”) preempts the City from enacting any smoking ordinance in places not considered a “public place” under that Act because any such ordinance would conflict with the state statute. Appellant’s reliance on the preemption doctrine is misplaced. In addition, Plaintiffs’ reading of the state Act would render at least one section of the Act completely meaningless, a result which is not allowed under basic statutory construction.

Appellant argues that because the Act does not prohibit smoking in certain areas, the Legislature intended to preclude municipalities from enacting ordinances prohibiting smoking in those areas not considered a “public place” under the Act. While Section 191.769 RSMo lists certain areas not to be considered a “public place” it does include places of work in the definition of public places. In considering Section 191.769 this Court should also consider the language of Sections 191.767 and 191.777.

Contrary to Appellant’s statement that there is no “anti-preemption” clause in the state statute, Section 191.767.2 RSMo states that “A smoking area may be designated by persons having custody or control of public places, except places in which smoking is prohibited by the fire marshal *or by any other law, ordinance or regulation.*” [emphasis added]. The Missouri Legislature contemplated that a municipality could enact ordinances prohibiting smoking in areas where the Act allowed it. The language of Section 191.769(5) does not grant a license to smoke in small bars. It just puts those bars outside the scope of the statute and leaves smoking in them unregulated.

The language of Section 191.777 RSMo specifically states that “[n]othing in Sections 191.775 and 191.776 shall prohibit local political subdivisions or local boards of education from enacting more stringent ordinances or rules.” This language is clear and unambiguous. Under the general rules of statutory construction, where a provision’s language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some

ambiguity. Another principle of statutory construction is that “‘every word, clause, sentence, and provision of a statute’ must have effect.” *Civil Serv. Comm. of the City of St. Louis v. Bd. of Alderman of the City of St. Louis*, 92 S.W.3d 785, 788 (Mo. 2003), quoting *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993).

The language of 191.777 RSMo does not limit a municipality’s authority to enact more stringent ordinances to only educational institutions or day care facilities. That language also does not limit it to only “public places.” The statutory section, adopted along with Sections 191.775 and 191.776 one year later, was simply confirming that no one should interpret the Legislature’s effort to amend the Act to be an act of “occupying the field,” or implied preemption. The Legislature clearly contemplated and left open the ability of municipalities to enact ordinances prohibiting smoking. If Appellant’s interpretation of the statute applies, neither clause that provides for more stringent ordinances by a municipality would have any meaning.

There is no implied preemption by state law in this case. State law “occupies” an area when it has created a comprehensive scheme on a particular area of the law, leaving no room for local control. *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 482 (Mo. 1973); *City of Maryville v. Wood*, 216 S.W.2d 75, 77 (Mo. 1948). When state law has so completely regulated a given area of the law, then it is said to be occupied, and any local act is preempted. *See Union Elec. Co.*, 499 S.W.2d at 482. If the locality attempts to add local

regulation to that area of law, it is invalid. *See Id.* at 484; *City of Maryville*, at 77.

The Legislature enacted Section 191.777 RSMo a year after the ICAA was enacted. That section was enacted along with the two sections to which it refers, Sections 191.775 and 191.776. Those sections further restricted the provisions of 191.765 through 191.774 as they related to day care facilities and educational institutions. In Section 191.777, the Legislature was making clear that its enactment of Sections 191.775 and 191.776 was not intended to occupy the field and prohibit municipalities from enacting more stringent ordinances.

The Missouri Legislature has been very clear when it intends to occupy the field related to a certain legislative topic. The Revised Statutes of Missouri is replete with examples of the Missouri general assembly expressly preempting local legislation by municipalities. *See*, for example, §572.100, RSMo, which states: “The general assembly by enacting this chapter intends to preempt any other regulation of the area covered by this chapter.”

By contrast, there is no express preemption language in the ICAA because the Legislature did not intend to preempt the field of smoking regulation. If it had wanted to preempt local legislation on the smoking issue, it would have clearly done so as it has in other areas. As the Circuit Court said in its order of January 5, “It should be noted that the State could have but did not expressly provide that there could be no further regulation of smoking by any other authority”. The court further stated that it was “not convinced that a definitional exclusion of certain businesses under the ICAA is the same as a specific declaration of preemption”.

*See, Order of January 5, 2009* by Hon. Judge Richard T. Standridge, Case No.: 0816-CR06724.

As a general rule, additional regulation to that of a state law does not constitute a conflict. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute required creates no conflict, unless the statute limits the requirement for all cases to its own prescriptions. *Vest v. City of Kansas City*, 194 S.W.2d 38, 39 (Mo. 1946). The 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 statutes must yield. *Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. 1990). The synopsis of the Indoor Clean Air Act states it is “[a]n Act to provide persons with access to smoke-free air in certain areas in certain public places, with penalty provisions.” 1992 Mo. Bill 509. This is exactly what the current ordinance does; it simply enlarges upon the provisions of the Act by prohibiting smoking in any enclosed public place and in any enclosed place of employment.

Appellant relies on a number of cases, including *Crackerneck Country Club, Inc. v. City of Independence*, 522 S.W.2d 50 (Mo. Ct. App. 1974), *Page Western, Inc., et al. v. Community Fire Protection District of St. Louis County*, 636 S.W.2d 65 (Mo. 1985), *City of St. Louis v. Klausmeier*, 112 S.W. 516 (Mo. 1908), and *City of St. Louis v. Stenson*, 333 S.W.2d 529 (Mo App. 1960). However, in those cases and in virtually all of the other cases cited by Appellant, the decision hinged on a conflict between a prohibitory municipal ordinance and a

state law or regulation that specifically licensed or authorized conduct which the municipality sought to prohibit.

In *Crackerneck*, the City of Independence was seeking to prohibit that which was expressly permitted by the state statute, in the form of liquor licensing laws. That is not the case here – the Appellant is licensed to serve liquor. No state agency has issued the Appellant a license to allow smoking in JC’s Sports Bar.

In *Klausmeier*, state law authorized the sale of dairy products within the state which met a minimum allowable content of milk solids. The municipal ordinance set a lower minimum milk solids content level. That is not the case here – the state has not authorized smoking in bars, but has simply excluded bars seating fewer than fifty patrons from the definition of a “public place”.

In *Page Western*, state regulations set specific standards for the installation of self-serve gasoline pumps at filling stations. Because the state specifically authorized the use of self-service gas pumps by the public, the St. Louis County fire protection district was not allowed to prohibit them. Such is not the case here – the state has not specifically authorized smoking in bars. The statute simply says that if a small bar posts signs telling people that it has no “non-smoking” areas available, it will not be considered a “public place” under the statute. The state statute also says that smoking may be permitted by bar owners “except in places in which smoking is prohibited by the fire marshal or by other law, ordinance or regulation”. The ICAA anticipates and permits local regulation.

In *Stenson*, the state law authorized the operation of tractor trailer trucks not more than forty five feet long on public roads and highways. The St. Louis ordinance restricted that length to no more than thirty three feet in certain areas. The court held the ordinance to be in conflict with the state statute because state law specifically granted truck drivers permission to operate forty five foot tractor trailer rigs on the public roads. This is not the case here. No state statute gives a bar owner or patron specific permission to smoke in a public place or in any place of employment.

Although not binding on this Court, the Appellant has cited the Opinion of Missouri Attorney General No. 80-96 (Jan. 12, 1996) as support for his opinion. A careful reading of that opinion supports the Respondent City's position that *Kansas City v. LaRose* is the controlling opinion on this subject even in light of the decision in *Page Western* about self limiting prescriptions within a state statute. As the opinion states, "... the Act 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". Opinion of Missouri Attorney General No. 80-96 (Jan. 12, 1996).

Section 191.769 RSMo is a prohibitory, rather than a permissive, statute. The right to allow smoking is not expressly given to certain areas. Rather, smoking is prohibited in some places and is not regulated other areas. Smoking is prohibited in some public places, but not others. That does not mean that an ordinance prohibiting smoking in either public places or places of employment is

in conflict with the Act. The absence of regulation does not equate to the grant of a license.

Under the Appellant's theory, an ordinance could never do more than mirror statutory language, or it would be either prohibiting what the statute permits, or permitting what the statute prohibits. This oversimplification of the concept of preemption would completely negate the City's police powers in any area of law where the State has enacted any statute and would make Section 191.767.2's mention of "other law, ordinance or regulation" utterly meaningless.

In *City of Kansas City v. LaRose*, 524 S.W.2d 112 (Mo. 1975), the Missouri Supreme Court addressed the issue of whether an ordinance that proscribes conduct that a similar state law does not is so in conflict with the statute as to be invalid. The Court in *LaRose* stated that

[w]here 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.

*LaRose* at 117. In the *LaRose* case, acts violating the statute also violated the ordinance, but the ordinance went further in that acts violating the ordinance would not necessarily violate the statute. The Court upheld the ordinance.

The same is true with the City's smoking ordinance. Acts which would violate the statute would also violate the ordinance; acts which would violate the

ordinance, however, might not violate the statute. Under *LaRose*, this does not make the ordinance in conflict with the Act. It is also the language of *LaRose* that distinguishes this case. In this case, the legislature not only did not expressly authorize or license smoking in areas such as those operated by Appellant, it expressly anticipated and contemplated ordinances that would be more restrictive than the ICAA.

**Amicus Brief of General Cigar Holdings, Inc.**

The Amicus whose brief was filed in this case attempts to inject an issue which was not raised at the trial level by stating that the City's ordinance prohibits smoking in tobacco stores. That issue is moot in that on September 25, 2008 by Ordinance Number 080910 the ordinance was amended to exempt tobacco stores which took steps to prevent contamination of the air in adjacent businesses.

The amicus, and to some extent the Appellant, make much of a New Jersey case [*LDM, Inc. v. Princeton Regional Health Commission*, 764 A2d 507 (2000)] holding that the state smoking statute governing restaurants in that state pre-empted local ordinances. That New Jersey case was examined by the United States 6<sup>th</sup> Circuit in *D.A.B.E., Inc. v. City of Toledo*, 393 F.3d 692 (6<sup>th</sup> Cir. 2005). In that Ohio case, the court distinguished the New Jersey case because the New Jersey smoking statute, unlike the Ohio and Missouri statutes, specifically stated that its provisions "shall supersede" any municipal ordinance concerning smoking in restaurants. The *Toledo* ordinance was thus held not to be in conflict with Ohio

statutes because, as here, the Ohio state statute did not claim to occupy the field or preempt more strict municipal regulation of smoking within its city limits.

### **Conclusion**

*LaRose* is controlling in this case. The ordinance does not forbid what the state has expressly permitted because the state statute does not expressly permit smoking in small bars or places of employment. The state statute simply says that smoking is not permitted in certain places and that other places (such as the Appellant's establishment) are not covered by the statute. The City's ordinance simply goes further and states that smoking is banned in not only all of the places banned by the State, but also other places such as places of employment and bars open to the public like the Appellant's. The Ordinance is not in conflict with the statute and should be upheld by this Court.

Respectfully submitted,

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### **Certificate of Compliance**

Respondent, by its attorneys, and pursuant to Supreme Court Rule 84.06(b), certifies that its Respondent's Brief is in Word 2003 format, proportionally typed in Times New Roman 13 point typeface and contains 3,149 words, excluding this cover and this certification.

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Lowell C. Gard

**Certificate of Service**

I hereby certify that on March \_\_\_\_, 2009, I mailed a true and accurate copy with a copy on a virus free floppy disk containing Appellant's Brief to the following:

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