

LEGAL CHALLENGES TO SMOKEFREE INDOOR AIR ORDINANCES*August 2004*

Legal challenges are among the tactics used by the tobacco industry to oppose local tobacco control ordinances. Although there are now more than 1600 local clean indoor air ordinances, successful legal challenges to these ordinances are extremely rare, and the ordinances almost always upheld by the courts.

Typically, when an ordinance is under consideration by a city council or board of health, a tobacco industry ally (e.g. restaurant, retailer, or advertising association) or front group will threaten a lawsuit in order to intimidate officials into a “no” vote for fear of incurring large expenses in defending the law. The truth is that city attorneys can usually defend these ordinances without incurring additional costs. By using the ANR model language, coalitions and city officials can head off most potential legal concerns.

Once an ordinance is enacted, opponents will typically file a lawsuit, and seek a temporary restraining order or an injunction to prevent implementation of the ordinance during the course of the lawsuit, which could last for months or even years. These suits can be filed in municipal, county, state or federal court, and oftentimes in both state and federal court. They are often filed on the basis of multiple legal theories, allowing judges to pick and choose the best arguments for overturning the law.

There are several different reasons for filing lawsuits, but the most common one is delay. Opponents know that once an ordinance is implemented, it is supported by the community, making repeal almost impossible. Restraining orders and injunctions buy the tobacco industry time. During the time that an ordinance is suspended, opponents will do several things, including gathering signatures for a repeal, garnering support for the weakening of ordinance language, and scaring the policymakers into repealing the law themselves.

Of course, lawsuits challenging an ordinance are filed in the hopes that a sympathetic judge will overturn it. While this is rare, it has happened, and tobacco advocates are always working to create more successful legal arguments.

Finally, lawsuits are filed as a means of scaring neighboring communities away from passing their own ordinances. The opposition may seek to bring the lawsuit as a hook for earned media and to convey a sense of controversy to other cities.

There are four common legal challenges to local clean indoor air ordinances: equal protection suits, due process suits, regulatory authority suits, and implied preemption suits. However, suits based on violations of the takings clause have become a new trend worth discussing as well. Most legal challenges will include multiple points, so we encourage you to become familiar with all these challenges.

Equal Protection Challenges

Some opponents have argued that laws restricting smoking violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and that such laws discriminate against smokers. The Equal Protection Clause requires the equal application of laws. A common misperception is that it requires everyone to be treated equally, but in actuality, it only requires that a law be applied equally to those it affects. There are three standards for review when evaluating the constitutionality of a law challenged under the Equal Protection Clause, but only one is applicable to clean indoor air ordinances. Such an ordinance need only be examined for reasonableness, under what's called the "rational relationship" test. As long as there is a rational relationship between the ordinance and a legitimate government interest, then the ordinance is not discriminatory. Since smoking is not a fundamental constitutional right, this is the appropriate standard.

Because there must be a rational relationship between the clean indoor air ordinance and the legitimate interest of protecting health, it is very important that a clean indoor air ordinance provide adequate steps to achieve its purpose of protecting nonsmokers from secondhand smoke. In 1979 a weak local law in Virginia restricting smoking in restaurants was invalidated because it failed to achieve its purpose of protecting nonsmokers in restaurants (the ordinance stated that restaurants could comply by simply designating a single table as nonsmoking). There was no rational relationship between having one table serve as a nonsmoking section and the protection of nonsmokers from secondhand smoke (*Alford v. City of Newport News*, 1979).

Exemptions in smoking control ordinances can create the possibility of an Equal Protection challenge. In 2001, restaurant owners in Kenosha, Wisconsin brought suit under the Equal Protection Clause, claiming that an exemption for restaurants whose sales of alcohol were more than 33% of total sales was an arbitrary exemption. The court affirmed the ordinance (*City of Kenosha v. Piliouras*, 2001).

The *Kenosha* and *Alford* decisions underscore the need to craft exemptions carefully, and to relate ordinance language and exemptions to the health risks that are regulated as much as possible. The fewer exemptions an ordinance contains, the less likely that an equal protection challenge will succeed. Grandfather clauses and hardship exemptions should be avoided as well as exemptions for such places as private clubs. For more information, consult the ANR fact sheet "Fundamentals of Clean Indoor Air Laws".

Due Process Challenges

There are two types of due process challenges- procedural and substantive, both of which are based on the Due Process Clause of the 14th Amendment to the U.S. Constitution.

The intent of procedural due process is to ensure that the government acts in a way that is fair and reasonable when making decisions that affect private individuals, and that it not engage in arbitrary action. If the procedure is fair and reasonable, and if there is adequate notice and a fair hearing, there has been procedural due process.

Procedural due process challenges are usually focused on procedural errors in the passage of an ordinance. In 2001, SouthCoast Citizens for Freedom, a group of restaurant and bar owners in

Massachusetts, filed suit against the New Bedford Board of Health for violating the state's open meeting law when they passed a comprehensive clean indoor air ordinance (*SouthCoast Citizens for Freedom v. New Bedford Board of Health*, 2001). While in this case the Board of Health started the process over and again passed the ordinance, merely filing the suit caused unnecessary delay and confusion. Suits also involve claims of overbreadth and vagueness, as is the case in a suit recently filed by the New York- based Dutchess/Putnam County Restaurant and Tavern Owners' Association.

Substantive due process, on the other hand, is intended to protect the public from arbitrary governmental action, regardless of the procedures used to implement it. Substantive due process is very similar to equal protection - they both use the "rational relation" test for rights that are not fundamental. For that matter, most cases based on discriminatory practice are now brought under the equal protection clause, but it is good to be aware that due process claims still exist (mostly involving claims of government intrusion into a private right). Also, many times opponents will bring suit claiming violations of both equal protection and due process.

In a 1992 California case, the defendant, who was cited for refusing to post "No Smoking" signs, argued that the ordinance violated: "a. The right to enjoy, own, and use property; b. The right to contract; and, c. The right to engage in a lawful calling/business." The court dismissed the arguments, finding that the defendant was not prohibited from serving smokers, that smokers did not have a fundamental right to smoke, and that the requirement to post "No Smoking" signs was not arbitrary (*California v. Smith*, 1992).

In 1996, a court in New Mexico dismissed a challenge to a Las Cruces ordinance, ruling that the "classifications included in the...ordinance are not clearly arbitrary and are rationally related to legitimate state interests." (*Marwan Haddad et al., v. City of Las Cruces*, 1996).

Regulatory Authority

Some local smoking restrictions have been enacted by regulatory agencies other than elected city councils. Local health departments or boards of health are the most common agencies outside of city councils to adopt smoking restrictions. Their authority to restrict smoking has been legally challenged in some jurisdictions. Although regulations adopted by health departments or boards of health in Massachusetts and West Virginia have been upheld, the authority of health departments or boards of health to adopt these regulations varies from state to state. Regulations adopted by these agencies must be even more careful than city ordinances to ensure that any exemptions relate to health considerations rather than other concerns.

In August, 2002, the Ohio Supreme Court ruled that a health board in Lucas County lacked the authorization to enact a nonsmoking ordinance, because it had no legislative authority to do so. Not only did the Court hold that the Ohio General Assembly had not indicated an intent to vest local boards of health with authority to adopt regulations addressing all public-health concerns, but they held that administrative regulations cannot dictate public policy. The Court stated that boards of health can only develop and administer policy already established by the General Assembly (*D.A.B.E. et al., v. Toledo-Lucas County Board of Health*, 2002).

Also in 2002, a circuit court in West Virginia held that, although the Cabell-Huntington Board of Health could impose *civil* penalties for violation of its clean indoor air regulation, they had no authority to impose *criminal* penalties, as the regulation called for. However, as of this printing, the case is being decided by the West Virginia Supreme Court (*Foundation For Independent Living, Inc., et al., v. Cabell-Huntington Board of Health*, 2002).

In a 1987 New York case, a smoking restriction which exempted conventions was struck down on the grounds that only the legislature, not a public health council, could decide factors based on economic considerations (*Boreali v. Axelrod*, 1987).

Boards of health and health departments are not the only regulatory authorities that have been tested in court. In 2001, the Village Council of Friendship Heights, Maryland, a special taxing district, repealed what was the toughest ordinance in the country because a Circuit Court judge temporarily blocked its enactment. He ruled that the village had no authority to exercise powers reserved for municipalities.

If a regulatory authority in your state is seeking to enact a smokefree regulation without a clear precedent, they can expect to receive a challenge based on regulatory authority.

Preemption Challenges

Preemption is a provision in state (or federal) law that eliminates the power of local (or state and local) governments to regulate tobacco; it is a serious threat to effective tobacco control. Some states have passed weak clean indoor air laws that explicitly forbid local communities from passing their own ordinances. Other states have passed clean indoor air laws but stay silent on whether communities have the right to pass local clean indoor air laws. This is “implied” preemption. In these states, tobacco industry allies have challenged local smoking control laws by charging that municipalities are preempted by state law from enacting their own clean indoor air laws, claiming that the state law “occupies the field” of regulation.

An ordinance passed in Ames, Iowa has been challenged all the way up to the Iowa Supreme Court; at heart is whether the Iowa Clean Indoor Air Act “occupies the field” of secondhand smoke (*James Enterprises, Inc., et al v. City of Ames*, 2003). In 2002, an ordinance in Helena, Montana not only survived a substantive due process attack but also survived an implied preemption claim, as did an ordinance in Colebrook, New Hampshire (*Helena Partnership, LLP et al. v. The City of Helena et al.* 2002; *JTR Colebrook, Inc. et al. v. Town of Colebrook* 2003).

However, ordinances do not always survive implied preemption suits. In 2001, Marquette, Michigan’s clean indoor air ordinance was struck down for conflicting with Michigan state law, which states that restaurants may designate up to 75% of its seating capacity as seating for smokers. Marquette’s ordinance would have mandated that restaurants designate 75% of seating for nonsmokers (*Michigan Restaurant Association et al., v. City of Marquette*, 2001).

It is important that state laws contain explicit anti-preemption language; otherwise a court may determine that a state law is preemptive even if the law does not explicitly state as much.

Takings Challenges

The Takings Clause is found in the 5th Amendment of the U.S. Constitution. It provides that private property may not be taken for public use without just compensation. The U.S. Supreme Court held in 1992 that property was to be compensated only if a regulation rendered the property completely valueless. In addition, the opinion stated that even if property is rendered valueless, if the regulation prohibits something that was not "previously permissible under relevant property and nuisance principles", then there can be no taking (*Lucas v. South Carolina Coastal Council*, 1992).

The "takings" argument, with respect to clean indoor air laws, is based on the myth that businesses lose money due to a clean indoor air law. Opponents may state that the value of their business permits will decline and, therefore, the government is taking property without compensation. However, all reputable studies clearly show that clean indoor air laws either result in no change in revenue or cause revenues to increase. Only the studies financed by the tobacco industry have shown a loss.

In 2001, the Supreme Judicial Court of Massachusetts ruled that "economic harm alone will not suffice as irreparable harm unless the loss threatens the very existence of the movant's business," (*Tri-Nel Management, Inc., et al. v. Board of Health of Barnstable, et al.*, 2001).

In 2002, a court in Montana threw out all claims except the one based on takings in the pending case regarding Helena's smokefree air ordinance.

Conclusion

As can be seen, lawsuits are a very common tactic used by the industry to either delay or overturn clean indoor air ordinances. However, with a carefully worded ordinance, these suits are almost always defeated. Americans for Nonsmokers' Rights urges you to adopt the ANR Model Ordinance language, as it has been proven to stand up to legal challenges. For more information, contact ANR at (510) 841-3032.

This information is not intended to serve as legal advice. Please have an attorney review model ordinances to analyze their legality.

REFERENCES

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