

To: CITY COMMISSION
From: CITY ATTORNEY
Date: September 22, 2008
Re: Indoor Air Ordinance

Current State Law



K.S.A. 21-4009, *et seq.*, prohibits smoking in public places, but allows business proprietors to designate smoking areas. The proprietor is given authority to designate any percentage of the establishment as "smoking" but must post signs with the designation and must use barriers and/or ventilation equipment to minimize the effect of second-hand smoke. "Public places" includes all indoor areas open to the public or used by the public.

Nothing in the act prevents a city from regulating smoking within its boundaries, so long as such regulation is at least as stringent as that imposed by the state. In such cases the more stringent local regulation controls. The fine for violation of the state law by a smoker is \$20. The fine for failure to post a sign is \$50.

Steffes v. City of Lawrence

On June 22, 2008, the Kansas Supreme Court handed down its decision on the City of Lawrence's smoking regulations. The plaintiff, doing business as Coyotes and Last Call, filed a declaratory judgment action in district court seeking injunctive relief prohibiting the city from enforcing its smoking ordinance. The Lawrence ordinance prohibits smoking in bars and restaurants (except private parties). Steffes contended that the ordinance was unconstitutionally vague and was pre-empted by state law.

With regard to the first issue, the Court found that the state law regulating smoking specifically reserved to cities the right to regulate smoking in any other places. Therefore, the State law does not prohibit cities from regulating smoking through the passage of ordinances that are at least as stringent as state law.

With regard to the second issue, the ordinance provides it shall be unlawful for any person who owns, manages, operates or otherwise controls the use of premises subject to the prohibition to knowingly allow smoking to occur. The Court found that the ordinance gave sufficient warning to a person of common intelligence that if smoking is tacitly, passively, or actively promoted on the premises, that was in violation. The Court found that the ordinance was not unconstitutionally vague.

This case is controlling law in the Kansas. Local smoking regulations which penalize owners, managers or others from permitting smoking to occur in violation of the regulation are not unconstitutionally vague. Local smoking regulations must be at least as stringent as state law on the subject under home rule analysis.

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Counter-Proposal to Clean Air Emporia Draft Ordinance

The counter-proposal to the Clean Air Emporia draft ordinance provides that any establishment which allows smoking shall post a sign on the entrance notifying customers that smoking is allowed. In addition, such establishments shall notify employees that smoking is allowed.

Current state law allows any proprietor to designate any or all of the business as smoking or non-smoking. The counter-proposal and state law are similar in that respect. Under the counter-proposal, a proprietor would be required to post a sign at the entrance, and also formally notify employees. In addition, the fine of \$100 for a first offense and \$500 thereafter is more stringent than state law which is a \$20 fine. If the counter-proposal were to be enacted in Emporia, its more stringent requirements would control over state regulation.

Clean Air Emporia Draft Ordinance

The Clean Air Emporia draft ordinance begins with a number of "Whereas" clauses. These clauses are a preamble to the ordinance and have no legal effect except to convey the intent, purpose or justification for the ordinance. "Whereas" clauses are useful when the Governing Body wishes to document the reasons for the enactment of the ordinance. Following the definition section, is a comprehensive ban on smoking in all enclosed public places and in all enclosed places of employment.

The Clean Air Emporia document is in draft form with many overlapping provisions. Some of the major issues in the regulation of indoor smoking are how to deal with bars and restaurants? How to deal with hotels and motels? How to deal with places of employment? And, how to deal with fraternal organizations?

Here is how some other cities have dealt with common concerns about smoking regulation.

Bars and Restaurants

Most of the smoking regulations adopted by Kansas cities include a complete ban in restaurants. Bel Aire and Lawrence exempt private functions held in restaurants. With regard to drinking establishments, 17 cities prohibit smoking, 8 cities exempt drinking establishments from the ban, and 3 cities allow drinking establishments to have designated smoking areas, which is the current state law.

Four of the 9 cities that exempt drinking establishments from a smoking ban require proof that the businesses gross receipts are less than 50% attributed to food sales: Abilene required food sales to be less than 45%. Concordia requires food sales to be less than 30%. Hutchinson requires food sales to be less than 50%. Lyons requires food sales to be less than 30%.

Hotels and Motels

Most of the cities which have addressed how to apply the smoking ban to hotels and motels have given at least a partial exemption from the smoking ban. The cities which have exempted a percentage of the rooms are: Bel Aire, Abilene, Fairway, Hesston, Lawrence, Maize, Olathe, Ottawa, Prairie Village, Roeland Park and Shawnee. Five cities have chosen not to regulate hotels and motels at all: Concordia, Garden City, Hutchinson and Lyons.

Enclosed Places of Employment

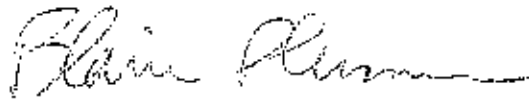
Eleven cities which enacted smoking regulations chose not to regulate enclosed places of employment. Sixteen cities chose to ban smoking in enclosed places of employment. Maize exempted non-public areas in places of employment. Topeka provided for designated smoking areas.

Private Clubs and Fraternal Organizations

Nine cities exempted private clubs and fraternal organizations. Sixteen cities prohibited smoking in private clubs and fraternal organizations. Four cities allow private clubs and fraternal organizations to designate smoking areas which is the current state law.

Individual Penalties

Twenty cities adopted a single dollar penalty ranging from \$20 in Merriam to \$100 a day in Abilene. Nine cities adopted a progressive penalty, for example, Lawrence which has regulations providing for \$100 for a first violation, \$200 for a second violation and \$500 for a third violation.



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Current State Law:

21-4009. Smoking in a public place; definitions. As used in this act: (a) "Public place" means enclosed indoor areas open to the public or used by the general public including but not limited to: Restaurants, retail stores, public means of mass transportation, passenger elevators, health care institutions or any other place where health care services are provided to the public, educational facilities,