

Local Government Law Bulletin

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Governmental Authority to Regulate Smoking

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the rights of local governments to exercise power in this regard. Although there are no binding precedents in North Carolina on regulation of tobacco, and the results of future challenges to the authority of governmental units cannot be confidently predicted, this bulletin concludes that our courts are likely to hold that smoking restrictions in public places are valid exercises of the delegated police power of municipalities and counties.

Whether a person smokes in public depends increasingly on external standards imposed through local ordinances and resolutions, state statutes or rules, federal regulation, and private-sector policies. As a result of all of these, it is becoming common to see signs in public places that either prohibit smoking altogether or limit it to designated areas. Similarly, the first question a restaurant patron may be asked is, "Smoking or nonsmoking?"

In private offices and buildings, smoking policies often are the result of internal decisions reached after varying amounts of discussion and debate. Many municipal, county, and state officials in North Carolina are conducting similar debates of their own. Should smoking in public places be more widely restricted? If so, how? And by whom?

This bulletin will review current information (1) on smoking in the United States; (2) on actions against smoking by the legislatures of North Carolina and other states; (3) on similar actions of some municipalities and counties; and (4) on challenges to

Prevalence of Smoking in the United States

The American love affair with smoking is cooling.¹ Smoking is less socially acceptable than it once was, as evidenced by the rise in the percentage of adults who are annoyed by smoke from people near them.² Further, the number of smokers in the adult population in the United States continues to decline. In 1990 the percentage was 25.5, down 2.6 percent since 1988.³ In a recent survey in North Carolina, a

1. Robert L. Rabin, *A Sociolegal History of Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856 (1992). The author points out that the change in attitudes toward smoking can be traced back to the 1950s, when the general public became aware of the health risks of smoking on a larger scale than ever before.

2. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS. A REPORT OF THE SURGEON GENERAL 23 (1989) [hereinafter 1989 SURGEON GENERAL'S REPORT]. Forty-six percent of adults found smoke an annoyance in 1964; sixty-nine percent found it an annoyance by 1986.

3. Centers for Disease Control, *Cigarette Smoking Among Adults—United States 1990*, 41 MORBIDITY AND

During the summer of 1992, the author was a law clerk for Anne M. Dellinger at the Institute of Government.

nearly identical percentage of adults said they were smokers.⁴

More detailed statistics reveal that 28.4 percent of male and 22.8 percent of female adults smoke. The ethnic group with the largest percentage of smokers is American Indians/Alaskan natives, at 38 percent, followed by blacks at 26.2 percent and whites at 25.6 percent.⁵ The lowest smoking rate is among college graduates; the highest is among those without a high school diploma, making education the greatest determinant of smoking prevalence.⁶

Despite the decline in smoking rates,⁷ an estimated 45.8 million Americans smoke.⁸

Health Effects of Smoking

The health effects of smoking are well documented. The medical community, led by the surgeon general of the United States Public Health Service, has labeled smoking the most preventable cause of death in the United States, contributing to more than one of every six deaths.⁹ Cigarette smoking is known to

cause cancers of the lung and respiratory tract, pancreas, urinary tract, and bladder. Smoking during pregnancy endangers the fetus, contributing to complications, low birth weight, and prenatal mortality.¹⁰

Public knowledge of the dangers of smoking has greatly increased in recent decades. Forty years ago, only 40 to 50 percent of adults believed that smoking causes lung cancer. By 1986, the figure was 92 percent. Similar increases have been noted in the number of people who believe that smoking heightens the risk of heart disease, emphysema, and chronic bronchitis.¹¹

The belief that tobacco smoke in the air negatively affects health has also spread. Such smoke, consisting of both exhaled smoke and that which escapes from the smoldering tobacco between and during puffs, is called environmental tobacco smoke (ETS).¹² Exposure to ETS is termed passive or involuntary smoking.¹³ Besides complaining about the odor, nonsmokers report symptoms such as eye and nasal irritation, headaches, and coughing as a result of involuntary smoking.¹⁴

For many, health concerns, annoyance, and the decline in social acceptance of smoking¹⁵ have translated into a reluctance to be around ETS. In 1985, a nationwide Gallup poll reported that 75 percent of people believed that smokers should not smoke when nonsmokers were present.¹⁶ A 1990 Gallup poll reports that restrictions on smoking enjoy widespread public support, even among smokers.¹⁷ A recent poll

MORTALITY WEEKLY REPORT 354, 361 (May 22, 1992) [hereinafter *Cigarette Smoking 1990*, MMWR]. The national survey conducted by the Centers for Disease Control (CDC) indicated that the decline in smoking was a significant change from previous years. There has been about a 0.5 percent drop each year since the mid-1960s.

4. Twenty-five percent of a sample of 600 state residents surveyed by Carolina Physicians Health Plan, a Raleigh-based health maintenance organization. Tinker Ready, *Health care views mixed*, NEWS & OBSERVER (Raleigh, N.C.), September 4, 1992, at 1B.

5. *Cigarette Smoking 1990*, MMWR, *supra* note 3, at 361. Although some influential studies previously noted that blacks smoke at a greater rate than whites (*see* 1989 SURGEON GENERAL'S REPORT, *supra* note 2, at 11), the CDC concluded that the rate is now comparable with that of whites, reflecting a 27.4 percent drop in smoking prevalence among black men since 1965.

6. 1989 SURGEON GENERAL'S REPORT, *supra* note 2, at 271. Respondents without a high school diploma continued to smoke at a similar rate in 1987 to that in 1966 (36.5 and 35.7 percent, respectively), while smoking rates for college graduates declined from 33.7 percent in 1966 to 16.3 percent in 1987.

7. *Cigarette Smoking 1990*, MMWR, *supra* note 3, at 361; 1989 SURGEON GENERAL'S REPORT, *supra* note 2, at 23.

8. Centers for Disease Control, *Discomfort from Environmental Tobacco Smoke Among Employees at Worksites with Minimal Smoking Restrictions—United States, 1988*, 41 MORBIDITY AND MORTALITY WEEKLY REPORT 351, 351 (May 22, 1992) [hereinafter *Discomfort from Environmental Tobacco Smoke*, MMWR].

9. 1989 SURGEON GENERAL'S REPORT, *supra* note 2, at 11.

10. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL 6* (1986) [hereinafter *INVOLUNTARY SMOKING*].

11. 1989 SURGEON GENERAL'S REPORT, *supra* note 2, at 22. Although the public has shown substantial gains in knowledge, many smokers do not know of or ignore health risks of smoking. An estimated 8 to 15 million smokers in 1986 did not believe that smoking increases the risk of contracting lung cancer, emphysema, chronic bronchitis, and heart disease.

12. National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, *Environmental Tobacco Smoke in the Workplace: Lung Cancer and Other Health Effects*, 54 CURRENT INTELLIGENCE BULLETIN 1 (June 1991) [hereinafter *NIOSH BULLETIN*].

13. *INVOLUNTARY SMOKING*, *supra* note 10, at 6.

14. James C. Byrd et al., *Passive Smoking: A Review of Medical and Legal Issues*, 79 AMER. J. PUB. HEALTH 209, 209 (1989).

15. *See* notes 1 and 2 and accompanying text.

16. *INVOLUNTARY SMOKING*, *supra* note 10, at 320.

17. Bruce E. Samuels et al., *Phillip Morris's Failed Experiment in Pittsburg*, 17 J. HEALTH POL., POL'Y AND L. 329, 330 (1992).

of Raleigh residents¹⁸ and a statewide poll conducted by the *Charlotte Observer* in 1986¹⁹ yielded similar results. Greensboro's referendum on smoking also suggests extensive support for restrictions.²⁰ The first referendum on smoking restrictions in Greensboro (November 7, 1989) passed by a narrow margin, and a petition for repeal was filed. That petition, however, was ultimately defeated by a two-to-one margin.²¹

The surgeon general's 1986 report on involuntary smoking²² sparked debate on the link between exposure to environmental tobacco smoke and disease. The report concluded that "involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers."²³ Along with its conclusions, however, the report acknowledged the difficulty of determining the risks of involuntary smoking. Differences between ETS and tobacco smoke inhaled by smokers, as well as the difficulty in measuring the extent of exposure to ETS, present unique challenges to researchers collecting and analyzing data.²⁴ Nevertheless, the report called attention to the number of lung cancer deaths not caused by active smoking.²⁵ Other studies have continued to produce evidence concerning the health effects of involuntary smoking. A National Institute for Occupational Safety and Health report²⁶ estimated that of the 7,000 lung-cancer deaths of females reported in 1986, fully 29 percent, or 2,010, were due to exposure to ETS. Eight hundred ten (16 percent) of 5,200 deaths of males from lung cancer were attributed to ETS.²⁷ In October, 1992, a study based on autopsies revealed a

higher—and statistically significant—rate of lung cancer among wives of smokers.²⁸

Not everyone agrees on the danger to nonsmokers from involuntary smoking. As recently as 1979, Virginia's supreme court said, "[w]hether tobacco smoke is toxic may be arguable . . ." ²⁹ The tobacco industry asserts that the evidence linking disease to ETS is flawed and contradictory.³⁰ Studies on involuntary smoking have gathered the bulk of their data from exposure caused by spousal smoking.³¹ Conclusions based on limited exposure to ETS in a public place are more difficult to reach. In the most closely analogous situation, some challenges based on exposure to smoke in the workplace have been successful.³² Since, however, like spousal smoking, exposure to ETS in the workplace is typically longer and more substantial³³ than the relatively brief exposure in public places, the link between involuntary smoking in a public place and a specific injury compensable through civil litigation would be difficult to establish at present. This fact may create an additional incentive for governmental regulation.

18. Those polled, who included a disproportionate number of smokers, favored restrictions in private workplaces, hospitals, public buildings, and restaurants. Research Triangle Institute poll for COMMIT to a Healthier Raleigh, 1991. Poll results communicated in telephone conversation with Sally Malek, Project ASSIST manager, Division of Adult Health in the Department of Environment, Health, and Natural Resources (July, 1992).

19. Liz Chandler, *Poll: Carolinians Favor Smoking Restrictions*. . . , CHARLOTTE OBSERVER, July 22, 1986, at C1.

20. The referendum resulted in an amendment to the GREENSBORO, N.C. CODE § 10-6 (1989).

21. Telephone conversation with Jesse L. Warren, Greensboro city attorney (July 8, 1992).

22. INVOLUNTARY SMOKING, *supra* note 10.

23. *Id.* at 7.

24. *Id.* at 7-8.

25. Eighty-five percent of the lung cancer deaths in 1986 were directly attributable to cigarette smoking. *Id.* at 8.

26. NIOSH BULLETIN, *supra* note 12.

27. *Id.* at 9.

28. Lawrence K. Altman, *Passive Smoking Tied to Cancer Risk in Study*, NEW YORK TIMES, Oct. 7, 1992, at B7.

29. *Alford v. City of Newport News*, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979).

30. Kathryn M. Doolan and Robert A. Indeglia, Jr., *A Call for Action: The Burning Issue of Smoking in the Workplace*, 5 J. OF CONTEMP. HEALTH L. AND POL'Y 221, 223 (1989).

31. NIOSH BULLETIN, *supra* note 12, at 8.

32. See Anne Dellinger, *Smoking at Work*, 71 HEALTH L. BULL. (Institute of Government, The University of North Carolina at Chapel Hill, 1988) or Anne Dellinger, *Smoking at Work*, 33 LOCAL GOV'T L. BULLETIN (Institute of Government, The University of North Carolina at Chapel Hill, 1988) for an overview of the legal issues concerning smoking in the workplace. Plaintiffs seek recovery on a number of theories including requests for unemployment benefits, recognition of disability, handicapped status, and a breach of the employer's duty to provide a safe workplace.

33. See, e.g., *ATE Fixture Fab v. Wagner*, 559 S. 2d 635 (Fla. 1990). The plaintiff worked in a small room over a long period with two heavy smokers and was awarded permanent and total disability for the aggravation of his lung disease due to ETS in his work environment. On appeal the award was reversed because there was no evidence that the claimant could not work at all, although there was sufficient causal evidence as to the worsening of his condition.

Regulation of Smoking in Places of Employment

Many employers, both public and private, have reacted to the legal, health, and economic problems ETS poses by restricting or even banning smoking in the workplace. A 1990 national survey found that nearly 60 percent of all adults who work outside the home worked in locations where smoking was restricted.³⁴ Employers cite the increased health insurance costs, absenteeism, and lost productivity associated with employees who smoke,³⁵ and sometimes even levy charges on such employees.³⁶ Some employers will hire only nonsmokers,³⁷ or hire preferentially according to whether applicants smoke.³⁸ Such practices have survived legal challenges³⁹ so long as employers apply the policy equitably.⁴⁰

In North Carolina, too, both public and private employers are increasingly prohibiting smoking on the job. Penalizing off-duty tobacco use, however, has recently been made illegal in the state. Legislation from the 1992 General Assembly makes it unlawful "for an employer to fail or refuse to hire"

34. *Discomfort from Environmental Tobacco Smoke*, MMWR, *supra* note 8.

35. Estimates for the increased annual costs per smoking employee range from \$336 to \$601, but actual amounts may even reach \$1000. Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?* 62 NOTRE DAME L. REV. 941, 946 (1987).

36. U-Haul International charges \$5.00 biweekly for those employees who smoke or chew tobacco, and Texas Instruments charges \$10.00 per month. Zachary Schiller et al., *If You Light Up on Sunday, Don't Come in on Monday*, BUSINESS WEEK, August 26, 1991, at 69.

37. *Smoking in the Workplace*, in INDIVIDUAL EMPLOYMENT RIGHTS MANUAL (BNA) § 511, at 201 (1987). Turner Broadcasting will no longer hire smokers and has had such a policy in effect since 1985. Schiller et al., *supra* note 36.

38. KURT H. DECKER, *EMPLOYEE PRIVACY LAW AND PRACTICE* § 7.7 (1987).

39. *But see* Rothstein, *supra* note 35, at 941, where the author concludes that decisions not to employ smokers "are unwarranted and subject to legal challenge" in addition to having little connection with furthering public health.

40. *Drug Testing, Sexual Harassment, Smoking: Employee Rights Issues*, 20 MANAGEMENT INFORMATION SERVICE, March 1988, at 18. *See* Moore v. Inmont Corp., 608 F.Supp. 919 (W.D.N.C. 1985), where a black employee discharged for smoking in violation of the smoking policy charged racial discrimination. The federal district court in North Carolina found that the policy, which resulted in automatic termination, was applied equitably to all employees.

someone or to discharge him for "the lawful use of lawful products" that occurs off the job and does not affect performance.⁴¹

The federal government, acting either as a landlord or an employer, does not have a smoking policy that covers all federal buildings and employees. However, the General Service Administration (GSA), the agency that manages government property and records, including buildings, supplies, and transportation, has had a clear policy in effect since 1986. Smoking is prohibited in buildings owned or leased by the GSA, except in certain areas that are to be designated by department heads. Locations off limits for smoking include work areas, mail rooms, court and jury rooms, and any areas where there is a danger of fire.⁴²

Heads of agencies housed in buildings owned or leased by the GSA are permitted to establish stricter policies than those required by the GSA regulations. The Department of Defense restricts tobacco use on all military installations, leaving the designation of specific smoking areas to each installation commander. The departments of Health and Human Services (HHS), Transportation, and Veterans' Affairs have opted for a total ban on indoor smoking,⁴³ although agencies face possible union challenges when they declare such a ban. In one notable case, HHS did not engage in collective bargaining before unilaterally declaring a smoking ban.⁴⁴ The Federal Labor Relations Board found that HHS had not demonstrated the compelling need necessary to preempt collective bargaining agreements, and the federal district court agreed, lifting the ban.⁴⁵

The White House is currently reviewing an executive order that would ban smoking in all executive branch agencies.⁴⁶

41. 1992 N.C. Sess. Laws ch. 1023, to be codified as Section 95-28.2(b) of the North Carolina General Statutes, ratified July 24, 1992, and effective October 1. [Hereinafter the General Statutes will be referred to as G.S.]

42. 41 C.F.R. § 101-20.105-3 (1991).

43. Patricia A. Parker, *Where There's Smoke, There's Ire*, 24 GOVERNMENT EXECUTIVE 28, 29 (1992).

44. *Dept. of Health & Human Serv. Family Support Admin. v. Fed. Labor Relations Auth.*, 920 F.2d 45 (D.C. Cir. 1990). The case has not been the only challenge to the authority to institute a smoking ban without the consent of the union. Courts have described smoking policies as conditions of employment, suitable for bargaining. *See also* *Dept. of Health & Human Serv. v. Fed. Labor Relations Auth.*, 885 F.2d 911 (D.C. Cir. 1989).

45. *Dept. of Health & Human Serv. Family Support Admin. v. Fed. Labor Relations Auth.*, 920 F.2d 45, 49 (D.C. Cir. 1990).

46. Parker, *supra* note 43, at 28.

Government Regulation of Smoking in Public Places

Federal Regulation

There is no recognized federal constitutional right to breathe air free from ETS, though the claim has been made,⁴⁷ and continues to be made.⁴⁸ Congress, however, has authority and responsibility to regulate a wide variety of activities, some of which it delegates to federal agencies.⁴⁹ Government often regulates tobacco use by users of public areas. As a result of federal regulation, for example, smoking is no longer allowed on domestic airline flights.⁵⁰ Interstate Commerce Commission regulations restrict smoking on buses, allowing smoking in the backs of buses only.⁵¹ Even with statutory delegation, agencies' authority to enact nonsmoking regulations has occasionally been challenged. For example, the Civil Aeronautics Board (CAB) requirement that airlines separate smoking and nonsmoking passengers was objected to and twice found to be a valid exercise of the agency's statutory authority.⁵²

47. See *Federal Employees for Non-Smokers' Rights v. United States*, 446 F.Supp. 181 (D.D.C. 1978); *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897 (5th Cir. 1978).

48. In *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991), the Ninth Circuit Court of Appeals found that an inmate had proved the necessary objective element of "cruel and unusual punishment" when he claimed to be exposed to ETS in amounts posing an unreasonable health risk. The Supreme Court vacated the judgment and remanded for reconsideration in light of its holding that the Eighth Amendment is not violated unless the offensive action is formal punishment or the inflicting officer's intent amounts to deliberate indifference to an inmate's welfare. *Heiling v. McKinney*, 112 S.Ct. 291 (1991). On remand, the Ninth Circuit reaffirmed its holding that the objective element was present, noting that the Supreme Court had simply added a subjective element to the inmate's burden of proof. 959 F.2d 853 (9th Cir. 1992). The Supreme Court will review the case again in the 1992-93 term, 60 U.S.L.W. 3869 (June 30, 1992).

49. The Federal Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1988), gives federal agencies the power to make rules and the authority to adjudicate disputes.

50. 14 C.F.R. § 252 (1992).

51. 49 C.F.R. § 1061 (1991).

52. See *Diefenthal v. Civil Aeronautics Bd.*, 681 F.2d 1039 (5th Cir. 1982). Smokers were denied seats in the first-class section of the airplane even though they held first-class tickets, and brought suit against the CAB. The court cited the language in the Federal Aviation Act of 1958 [49 U.S.C.A. §§ 1301-1542 (1976)], which requires carriers to provide "adequate service," as providing the

The Environmental Protection Agency (EPA) is charged with controlling and eliminating certain risks to human health and to the ecological system.⁵³ EPA does not yet regulate ETS, although EPA recognizes that ETS presents a serious health risk⁵⁴ and arguably does fit the standards for regulatory action established by amendments to the 1990 Clean Air Act.⁵⁵

The Occupational Safety and Health Administration (OSHA), a division of the Department of Labor, is responsible for adopting standards affecting health and safety in the workplace, including indoor air quality.⁵⁶ OSHA can set standards either on its own initiative or as a result of petitions from other parties, including the Environmental Protection Agency. Despite considerable interest in regulation and litigation to produce it,⁵⁷ there are currently no OSHA guidelines for exposure to ETS in the workplace.

power to regulate smoking. In *Action on Smoking and Health v. Civil Aeronautics Bd.*, 699 F.2d 1209 (D.D.C. 1983), the court said the Federal Aviation Act provided authority to regulate smoking on air carriers engaged in both interstate and domestic travel. The responsibility for smoking regulations is now in the Department of Transportation. 55 Fed. Reg. 4991 (1990).

53. Alan B. Horowitz, *Terminating the Passive Paradox: A Proposal for Federal Regulation of Environmental Tobacco Smoke*, 41 AMER. UNIV. L. REV. 183, 183 (1991) [citing UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 11 (1990)].

54. See Horowitz, *supra* note 53.

55. 42 U.S.C.A. § 7412 (Supp. 1991). EPA stated that it considers a cancer risk of no more than one in ten thousand for individuals exposed throughout their lifetimes to be safe. National Emission Standards for Hazardous Air Pollutants, 54 Fed. Reg. 38,044 (1989). If the estimates by the EPA of the number of cancer deaths caused by involuntary smoking are translated to a risk analysis, then ETS poses a risk that is of greater magnitude than that which EPA has termed a safe exposure. See Horowitz, *supra* note 53, at 202.

56. 29 C.F.R. § 1910 (1991).

57. OSHA has been pressured for years to set a standard for workplace smoking. In May, 1987, OSHA was petitioned twice to set an emergency temporary standard prohibiting smoking in all indoor workplaces except those designated as smoking areas. OSHA denied both requests, finding that the evidence on ETS did not warrant the emergency standard. 57 Fed. Reg. 16952 (1992). One of the groups petitioning for the emergency standard, Action on Smoking and Health, then filed suit against OSHA. In an unpublished opinion, the United States Court of Appeals for the District of Columbia Circuit said, "[w]e are satisfied by OSHA's representation that it will decide whether and how to regulate exposure to tobacco smoke in the workplace as soon as possible following analysis of the comments it receives in response to the September 20, 1991,

State Regulation

Following the release of information about the harmful effects of exposure to ETS,⁵⁸ restrictions on public smoking are now an issue in North Carolina and other states. The power to protect citizens' health, safety, and welfare—called the police power—belongs in the first instance to the state and, only if delegated by the state, to local government. Thus a state legislature may itself legislate concerning smoking and may also, if it wishes, prevent local regulation of smoking—called preemption. The North Carolina legislature has done neither.

As of 1988, the Bureau of National Affairs listed forty-two states and the District of Columbia that had statewide smoking regulations.⁵⁹ The restrictions vary tremendously. Minnesota's restrictions affect virtually all public places, including retail stores and public and private workplaces.⁶⁰ In contrast, New Jersey merely requires that employers and government supervisors establish written policies. There are few other restrictions, and adding more is forbidden—that is, local authority is specifically preempted by the state.⁶¹

Both North Carolina's closest neighbors recently enacted legislation concerning smoking. In August, 1990, South Carolina passed a clean indoor air act.⁶² In 1992 Virginia passed restrictive legislation allowing local ordinances in effect before July of 1989 to remain law.⁶³ With that exception, both

Request for Information on Occupational Exposure to Indoor Air Pollutants." The court dismissed the suit without prejudice so that it can be reinstated if OSHA does not act within a reasonable time. *Action on Smoking and Health v. OSHA*, No. 91-1037, slip op. at 2 (D.C. Cir. filed Jan 29, 1992).

58. After years of deliberation, on January 7, 1993, the Environmental Protection Agency issued a final report classifying ETS as a carcinogen responsible for approximately 3,000 lung cancer deaths annually in the United States. The agency declined at this time to link ETS and heart disease. Paul Raeburn, *Secondhand smoke called carcinogen in EPA report*, NEWS & OBSERVER (Raleigh, N.C.), January 6, 1993, at 1A.

59. *Smoking in the Workplace*, in INDIVIDUAL EMPLOYMENT RIGHTS MANUAL (BNA) § 511, at 203 (1988).

60. MINN. STAT. ANN. §§ 144.411 through 144.417 (West 1989).

61. N.J. STAT. ANN. §§ 26:3D-38 through 26:3D-54 (West 1987). The act states that its purpose is "to control smoking in certain indoor public places." Smoking is prohibited in registered pharmacies, where hearing aids are sold, and in certain government buildings.

62. S.C. CODE ANN. §§ 44-95-10 through 44-95-60 (Supp. 1991).

63. VA. CODE ANN. §§ 15.1-291.1 through 15.1-291.11 (Supp. 1992).

states forbid local ordinances stronger than the state statutes.⁶⁴

An unsuccessful effort to enact preemptive state legislation was made in the 1991 session of the North Carolina General Assembly. House Bill 149 would have prohibited smoking in elevators, public transportation, museums, and libraries, as well as forbidding employment discrimination based on tobacco use.⁶⁵ Nonsmoking areas would have been created in public buildings, and restaurants could have chosen to create such areas. Most significantly, the bill would have superseded and prohibited any local regulation.⁶⁶

The question of when action at the state level preempts local smoking regulations has been an important question elsewhere. While not currently relevant to North Carolina, the question may arise here in future. If state legislation does not specifically preempt the field being regulated, courts must construe it, asking whether the breadth of the law indicates an intent to occupy the entire field. If it does, another question remains: what happens to preexisting ordinances? Courts may be asked to decide whether ordinances already in effect are voided⁶⁷ or allowed to stand.⁶⁸

Local Regulation

Local governments around the country have in effect more than 400 smoking ordinances.⁶⁹ Almost 200 were enacted in the two years following the publication of the surgeon general's report in 1986 on the health consequences of involuntary smoking.⁷⁰ Several

64. VA. CODE ANN. § 15.1-291.4 (Supp. 1992); 1990 S.C. Op. Att'y Gen. 111 (1990) (found that the General Assembly intended to preempt further regulation of smoking in public areas in South Carolina).

65. In addition, smoking areas were required to be established in the lobby of an auditorium, arena, or coliseum that had been designated as nonsmoking in its entirety. In other places open to the public, a smoking area was to be established equal to 25 percent of the nonsmoking area (restaurants that were entirely smoking or nonsmoking excepted). Signs were required to be posted, and a penalty for violations was set at \$25.00. House Bill 149, 1991 N.C. General Assembly, 1st Sess. (1991).

66. "This Article shall supersede and prohibit the enactment of any other local laws, rules of State or local agencies, and local ordinances regulating smoking and the use of unlighted tobacco products." *Id.*

67. FLA. STAT. ANN. § 386.208 (West 1986).

68. ILL. ANN. STAT. ch. 111 1/2 para. 8211 (Smith-Hurd 1992).

69. Karen J. Fisher, *Smoke Free or Free to Smoke?*, AMER. CITY & COUNTY, February, 1989, at 54.

70. *Id.*

cities and at least one county in North Carolina have ordinances, relying on their delegated police power from the state.⁷¹

Raleigh's ordinance, which became effective July 1, 1992, is broad and perhaps typical, beginning with its purpose: "[t]o protect and promote the public health and welfare by regulating smoking in public places and places of employment to minimize the public's exposure to ETS." The ordinance enumerates where smoking is either prohibited or regulated.⁷² No smoking is allowed in enclosed shopping malls, educational facilities, rest rooms, or health-care facilities, among other places. Smoking is regulated in workplaces,⁷³ eating establishments, public areas of business and retail establishments, and overnight and emergency shelters. Smoking is permitted in retail tobacco stores. The following are specifically excluded from the ordinance: private residences, otherwise regulated places being rented for private functions, and state and federal facilities.⁷⁴ Signs relating to the smoking policy must be conspicuously posted. Provisions are made for enforcement⁷⁵ as well as for penalty⁷⁶ for willful violations.

Basis of North Carolina Local Governments' Authority

The Scope of Ordinance-making Authority

The authority of local governments to enact ordinances is traceable to the state's police power.⁷⁷ In North Carolina, local governments "possess only such powers and delegated authority as the General

Assembly may deem fit to confer upon them."⁷⁸ Thus North Carolina follows Dillon's rule, which holds that a local government may exercise only the powers expressly granted to it by the state, those necessarily implied from the express grant, and those that are essential to its purpose. (In contrast, local governments in a "home rule" state may exercise any powers not specifically reserved to the state.)

The General Assembly has conferred ordinance-making authority on both counties and cities in North Carolina in nearly identical language. The county grant provides in part that "[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances."⁷⁹

Note that local ordinances may be based on protection of health and safety. It is also significant that courts are instructed to construe local ordinance-making authority broadly. The provision for counties reads as follows:

It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.⁸⁰

The combination of the health and safety language of the statutes conferring ordinance-making authority and the statutory policy of broadly construing such authority strongly suggests that, in the absence of preemptive state regulation, local governments in North Carolina have the power to regulate smoking. Assuming such power exists, however, it is not without limitations. Constitutional rights must be preserved;⁸¹ ordinances must be reasonable and enacted in good faith.⁸²

78. *Stam v. State*, 302 N.C. 357, 360, 275 S.E.2d 439, 441 (1981).

79. G.S. 153A-121. For city authority, see G.S. 160A-174.

80. G.S. 153A-4. For city authority, see G.S. 160A-4.

81. Dismissing a complaint by students about a school smoking ban, the North Carolina Court of Appeals, citing *Gaspar*, (see note 47) stated, "The right to smoke in public places is not a protected right, even for adults." *Craig v. Buncombe Bd. of Education*, 80 N.C. App. 683, 685 (1986).

82. 6A J. JEFFERY REINHOLTZ & MYRON W. WASIUNEC, *MCQUILLIN MUNICIPAL CORPORATIONS* § 24.09 (3d ed. 1988).

71. The list of locales with ordinances includes Chapel Hill, Greensboro, Raleigh, and New Hanover County.

72. RALEIGH, N.C., CODE § 13-3016(b) through § 13-3016(e).

73. Employers are required to make "reasonable provisions" for the needs of nonsmoking employees. Although smoking may be entirely prohibited at any workplace, each employer must have a written smoking policy, to be supplied to prospective and present employees on request. Smoking areas in the workplace must be clearly marked. *Id.* § 13-3016(c).

74. *Id.* § 13-3016(i).

75. The person in charge of the place where smoking is regulated must "make reasonable efforts to prevent smoking in nonsmoking areas." *Id.* § 13-3016(j).

76. The penalty is set at \$25.00.

77. Defined as the power by which the public authority promotes the public welfare by compelling or controlling actions. 7 CHARLES R. P. KEATING & MYRON W. WASIUNEC, *MCQUILLIN MUNICIPAL CORPORATIONS* § 24.04 (3d ed. 1989).

Of the hundreds of smoking ordinances enacted nationwide, a few have been challenged, sometimes successfully. A review of these cases may be instructive for North Carolina governments, although the age of most may lessen their precedential value.

Local governments' efforts to regulate public smoking began more than a century ago in the United States and, interestingly, were usually based on health concerns—long before there was scientific proof of harm.⁸³ The earliest decisions result from state supreme court review of local ordinances. The Supreme Court of Massachusetts in 1847 upheld a complete prohibition of smoking in Boston's streets and public areas as a fire-prevention measure,⁸⁴ but later courts, before approving limitations, have looked for evidence that smoke harms others. Louisiana's supreme court upheld an ordinance forbidding smoking in New Orleans streetcars on grounds the practice was a nuisance and a threat to public health.⁸⁵ In 1898 the Illinois Supreme Court upheld, also on public health grounds, requirements that Chicago's tobacco vendors be licensed and not be allowed to operate close to schools.⁸⁶

But sixteen years later the same court ruled that the city of Zion was unreasonable in prohibiting smoking on all streets or in public parks. Acknowledging that smoke is offensive and occasionally

harmful, the court noted the width of the streets and size of the parks in Zion (1,000 acres for a population of 5,000) and struck down the ordinance.⁸⁷ A Kentucky city that tried to ban tobacco use anywhere within the city limits was also found to have invaded residents' liberty unreasonably, though the court did recognize the possibility of danger to smokers' own health.⁸⁸

In *Alford v. City of Newport News*,⁸⁹ the Supreme Court of Virginia found an ordinance irrational as applied. The ordinance required that a "No Smoking" sign be posted and a nonsmoking area be set aside in every restaurant. Where, as in the defendant's restaurant, there was only one room and the designated area a single table, the court found the sign misleading and the table designation to be in conflict with the purpose of the ordinance. Reading the sign, a restaurant patron might believe he or she would be protected from smoke when in fact he or she would not. The court said, "[T]he police power may not be used to regulate property interests unless the means employed are reasonably suited to the achievement of that goal."⁹⁰ In *Swanson v. City of Tulsa, Oklahoma*,⁹¹ however, the court found an ordinance to be a valid exercise of the police power and not unreasonably vague.

Since none of the smoking ordinances adopted in North Carolina have been challenged, there is no case law here on smoking regulation. One can, however, consider recent North Carolina precedents construing the general authority of local government to enact ordinances. In *River Birch Associates v. City of Raleigh*,⁹² the state supreme court upheld a city ordinance requiring real estate developers to keep a pledge to convey recreational land to the development's homeowners' association. The court noted the injunction to construe city powers broadly [G.S. 160A-4] and did so despite the inartful wording of the statutory delegation⁹³ and a "line of cases

83. The Tennessee Supreme Court also used health to justify finding that cigarettes were not "legitimate objects of commerce" and thus could be taxed by the state without violating the federal power to regulate commerce. The court said that cigarettes are "wholly noxious and deleterious to health . . . Beyond question, their every tendency is towards the impairment of physical health and mental vigor." *Austin v. State*, 101 Tenn. 563, 566, 48 S.W. 305, 306 (1898), *aff'd*. on other grounds, 179 U.S. 343 (1900).

84. *Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847).

85. The weighing of the issues and the justices' personal ambivalence on smoking sound surprisingly modern: "There is no doubt of the fact that smoking in the streetcars in the city of New Orleans had caused to a great majority of the people using them material annoyance, inconvenience, and discomfort . . . There is not only discomfort, but positive danger to health from the contaminated air. The record establishes these facts. Smoking, in itself, is not to be condemned for any reason of public policy. It is agreeable and pleasant—almost indispensable to those who have acquired the habit; but it is distasteful and offensive, and some times hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places." *State v. Heidenhain*, 42 La. Ann. 483, 7 So. 621 (1890).

86. *Gundling v. City of Chicago*, 176 Ill. 340, 52 N.E. 44 (1898).

87. *Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

88. *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911).

89. 270 Va. 584, 260 S.E.2d 241 (1979).

90. *Id.* at 586, 260 S.E.2d at 243.

91. 633 P.2d 1256 (Okla. 1981).

92. 326 N.C. 100, 388 S.E.2d 538 (1990).

93. The city of Raleigh's authority for its ordinance requiring developers to convey land to homeowners' associations was G.S. 160A-372. It provided that a subdivision control ordinance may require "dedication or reservation" of common areas for the benefit of subdivision residents. While conceding that the terms "dedication" and "reservation" are used incorrectly in the statute, the

holding that because the zoning and subdivision regulations are in derogation of private property, such provisions should be liberally construed in favor of the owner.⁹⁴

A decade earlier the same court had interpreted the powers of local government more narrowly. *State v. Stam*⁹⁵ struck down Wake County's practice of funding indigent women's "medically unnecessary" abortions. To reach its conclusion the court construed the following statute, G.S. 153A-255:

Authority to provide social service programs.— Each county shall provide social service programs pursuant to Chapter 108 and Chapter 111 and may otherwise undertake, sponsor, organize, engage in, and support other social service programs intended to further the health, welfare, education, safety, comfort, and convenience of its citizens. [Court's emphasis omitted.]

In finding that the statute did not delegate authority for abortion funding, the court stressed two factors: first, that local government's taxing power (unlike its ordinance-making power) must be strictly construed, and second, "that the morality and legality of abortions have been and remain topics of widespread emotional and intellectual debate."⁹⁶ Using strict construction the court held that county's ability to fund social services is limited to "providing the poor with the basic necessities of life" and that it is "inconceivable that the legislature would have intended medically unnecessary abortions to be basic necessities of life."⁹⁷ Had the General Assembly wished to allow local funding of abortion, the court assumed it would have "made its intent clear by express authorization."⁹⁸

Stam, in turn, rests on a 1979 decision that a county was without authority under the statute quoted above to fund a school for dyslexic children.⁹⁹ There the court announced the principle it reiterated in *Stam*, that county-funded social services programs

court refused to find that that invalidated the grant of authority to cities and thus the ordinance: "When the clear purpose of a statute would be subverted by a mechanical application of a technical term, the courts will interpret that term to ensure that the legislative purpose achieves its full effect." *Id.* at 109, 388 S.E.2d at 543.

94. *Id.* at 110-111, 388 S.E.2d at 544.

95. 302 N.C. 357, 275 S.E.2d 439 (1981).

96. *Id.* at 363, 275 S.E.2d at 443.

97. *Id.* at 362, 275 S.E.2d at 442.

98. *Id.* at 363, 275 S.E.2d at 443.

99. *Hughey v. Cloniger*, 297 N.C. 86, 253 S.E.2d 898 (1979).

may address only "the needs of impoverished citizens who are unable to provide for the basic necessities of life."¹⁰⁰ The court considered neither the school nor abortion for indigent women to be necessities.

What inferences may be drawn from these cases about the outcome of any challenge to local smoking ordinances? While regulation of tobacco use is scarcely less controversial than abortion in North Carolina, it may be significant that both *Hughey* and *Stam* concern local government's taxing and spending power. Presumably local government may regulate in more instances than it may tax or spend. Moreover, the *River Birch* case (1990), with its expansive view of regulatory authority, postdates *Stam* (1981). For these reasons *River Birch* seems a stronger precedent for challenges to smoking regulation.

Initiative and Referendum

Local governments may act through means other than ordinances. If a city's charter permits initiative and referendum,¹⁰¹ these are alternative methods of making a proposal into law. In cities that allow for them, their permissible content may or may not be limited.¹⁰² In either case, typically, a fixed percentage of registered voters within the jurisdiction must sign a petition before the proposed ordinance will be submitted to the governing board. If the board declines to adopt the ordinance, it is put to a general vote of the electorate.

Few residents of North Carolina have the opportunity to use these means, however. Since there is no state constitutional provision for initiative and referendum, a city's charter must contain a specific provision, and very few do.¹⁰³ Still, Greensboro's smoking ordinance is the result of a 1989 referendum.¹⁰⁴

100. *Id.* at 93, 253 S.E.2d at 902.

101. Referendum is the process of submitting proposals to a direct vote of the electors, while initiative is the means used to set referenda in motion. 5 DEBORAH L. NELSON & CHARITY R. MILLER, MCQUILLIN MUNICIPAL CORPORATIONS § 15.02 (3d ed. 1989).

102. For example, Wilmington's charter says, "Any proposed ordinance may be submitted . . ." Art. V, § 5.1(a). Greensboro's charter excludes ordinances proposing part of the city budget, appropriating or repealing appropriation of funds, setting city officers' or employees' salaries, or authorizing tax levies. Greensboro City Charter, Ch. II, subchapter D, art. 2, § 2.71.

103. Those that do include Asheville, Greensboro, Lewisville, Lumberton, Raleigh, and Wilmington.

104. See GREENSBORO, N.C. CODE, *supra* note 20 and accompanying text.

Resolutions

If a county or city wishes merely to regulate smoking in its own buildings or among its own employees, it may pass a resolution to that effect. A resolution is an action by the governing board of the local government, often ministerial or administrative in nature; it is less formal than an ordinance and often deals with special, perhaps temporary, matters.¹⁰⁵ The city of Charlotte,¹⁰⁶ as well as Durham, Gaston, Edgecombe, and Orange counties, have smoking resolutions in effect which vary greatly in scope. For example, Edgecombe County lets heads of county departments designate smoking and nonsmoking areas, while Gaston County's resolution forbids smoking in any county building.¹⁰⁷

Board of Health Regulations

County boards of health are responsible for promoting and protecting the public's health.¹⁰⁸ But, like all of local government in North Carolina, the board of health has only the authority that the General Statutes provide, either expressly or by necessary implication.¹⁰⁹ Although health concerns about ETS have led several health boards to consider adopting rules on smoking in public places, so far none have done so. In New Hanover County it was the board of health that initially proposed a rule on smoking, but the restrictions ultimately adopted were enacted as an ordinance.¹¹⁰

A locale wishing to restrict smoking needs to weigh advantages of board of health rules against the

advantages of an ordinance. For those who want to curb it, tobacco use is primarily a health and safety issue, and restrictions are probably best understood and accepted by the public when presented in those terms. Given the charge and the membership of boards of health (half the members are health workers), they may be more knowledgeable and concerned about public health—and thus more likely to act on smoking—than boards of county commissioners or city councils. Further, board of health rules apply throughout the county or multicounty district in which they are adopted. A city ordinance applies only within the city, and a county ordinance only in the unincorporated portions of the county. Finally, violation of board of health rules may be punished more severely than violation of an ordinance.¹¹¹

On the other hand, there are advantages to an ordinance. Chief among them probably is the greater certainty of its legal authority, derived both from the scope of the ordinance-making power and from the rarity of successful challenges to smoking ordinances. Then too, as noted, ordinances may be based on concerns in addition to health and safety. By comparison, board of health authority is narrow. North Carolina statute provides that "A local board of health shall have the responsibility to protect and promote the public health. The board shall have the authority to adopt rules necessary for that purpose."¹¹²

If a court found, for example, insufficient proof of harm to public health from ETS, it would presumably invalidate a board of health rule. Identical restrictions contained in an ordinance might be valid still, on other grounds.

A final merit of ordinances is the *range* of available enforcement measures. Though the criminal fine and imprisonment terms for violations are milder than those for violations of board of health rules, a county or city may also enforce ordinances by means of civil fines, injunctions, abatement orders, and other equitable remedies.¹¹³

Enforcement Issues

The parties responsible for enforcement may be those in charge of the building that is subject to the

105. NELSON & MILLER, *supra* note 101.

106. Charlotte's smoking policy governing smoking in city facilities establishes smoking and nonsmoking areas for the public as well as for employees. Enforcement is a matter for which all employees share responsibility. Since the personnel department is named as the responsible party, violations by employees are treated as disciplinary matters. The penalties range from verbal warnings to a two-day suspension without pay for a fifth violation in a one-year period. No penalties are mentioned for the public.

107. Gaston County Smoking Resolution #91-157 (passed on May 23, 1991).

108. G.S. 130A-39(a) (1991). The promotion of the public health is an object of the police power. 7 KEATING & WASIUNEC, *supra* note 77, § 24.221.

109. *Champion v. Vance County Board of Health*, 221 N.C. 96, 19 S.E.2d 239 (1942); *State v. Curtis*, 230 N.C. 169, 52 S.E.2d 364 (1949).

110. Kelvin Hart, *County's Smoking Regulations Begin Oct. 1*, WILMINGTON MORNING STAR, July 24, 1990, at C1. See NEW HANOVER, N.C., CODE § 8.5-32 (1990).

111. Violation of board of health rules is a general misdemeanor, G.S. 130A-25(a) (1992), the penalty for which is up to two years' imprisonment and/or an unspecified fine, G.S. 14-3(a) (1991 Supp.). Violation of an ordinance may be punished by no more than thirty days' imprisonment and/or a fine up to \$500. If the fine is not otherwise specified, it is only \$50.00, G.S. 14-4 (1991 Supp.).

112. G.S. 130A-39(a).

113. G.S. 153A-123 (1991); G.S. 160A-175 (1987).

regulations,¹¹⁴ the police (in a municipality), or the sheriff's department or board of health (in a county).¹¹⁵ Penalties for violation vary, but thus far in North Carolina they have been low—for example, \$50.00 in New Hanover County¹¹⁶ and \$25.00 in Raleigh.¹¹⁷

Some doubt the feasibility of enforcing smoking regulations.¹¹⁸ Indeed, though no citations have been written in Raleigh since that city's 1992 ordinance, 223 complaints have been received.¹¹⁹ Raleigh officials claim, however, that the number of complaints does not reflect the decline in smoking in public places since the ordinance went into effect.¹²⁰ Other local governments in North Carolina report few problems with enforcement.¹²¹ The New Hanover County ordinance is reported to be working well, as are the Gaston and Edgecombe county resolutions. While some complain that smoking continues in the Durham County courthouse despite the nearly year-long ban on

smoking in county buildings, most department heads report that employees are respecting the ban.¹²²

Conclusions

North Carolina courts have not yet been asked to decide the validity of smoking regulations,¹²³ and the disposition of such cases cannot be predicted with certainty. It is quite likely, however, that county commissioners and city council members do have the authority to impose restrictions and that boards of health may as well. Any local governmental entity that regulates tobacco use should identify—and document—the bases for the restrictions, noting the connection to a permissible governmental goal. Regulations that meet that description should be valid exercises of the police power delegated to local government.

114. RALEIGH, N.C., CODE § 13-3016 (j) (1992).

115. NEW HANOVER, N.C. CODE § 8.5-32 (1990).

116. *Id.*

117. RALEIGH, N.C., CODE § 13-3061(j)(1992).

118. Doolan and Indeglia, *supra* note 30, at 243 (citing predictions from the tobacco industry that significant resources would be used for enforcement of workplace smoking laws).

119. Debbi Sykes, *Raleigh spares the rod in enforcing anti-smoking ordinance*, NEWS AND OBSERVER (Raleigh, N.C.), November 30, 1992, at B1.

120. *Id.* at B2.

121. Informal telephone survey, conducted by the author, of ten local governments with smoking resolutions or ordinances (July 8, 1992).

122. Thomas Healy, *Something smells funny at smoke-free Durham courthouse*, NEWS & OBSERVER (Raleigh, N.C.), June 5, 1992, at B2.

123. Except for a ban on smoking by high school students. *Craig v. Buncombe County*, 80 N.C. App. 683, 343 S.E.2d 222.