

# Local Government Law News

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## SMOKING BAN UPHELD IN HEART OF THE BLUEGRASS

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Proponents of strong home rule in the Commonwealth received pleasant news this spring when the Supreme Court of Kentucky held that local governments have the authority to ban smoking in places of public accommodation. The court's landmark 6-1 ruling in *Lexington Fayette County Food and Beverage Association v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745 (Ky. 2004), represents clear precedent in favor of local regulation of tobacco use in Kentucky and is sure to provoke many lively legislative debates in both the General Assembly and local communities throughout the state.

The issue came before the Supreme Court after the Lexington-Fayette Urban County Government, following much study and public debate, passed a sweeping smoking ban on July 1, 2003.<sup>2</sup> The enacted ordinance prohibited smoking in all enclosed buildings open to the public within Lexington-Fayette Urban County Government, with a few limited exceptions.<sup>3</sup> Due to the law's primary aim of securing a healthier working environment for all employees in the city, the ordinance's prohibition necessarily included restaurants, bars and nightclubs. Thus what was once unthinkable to many in the heart of tobacco country occurred. Citizens would no longer be able to "light up" after a meal or over a drink at their favorite Lexington watering hole.

Although the council's actions enjoyed widespread support in the community, many local business owners, patrons and civil libertarians strongly opposed the ordinance. The Lexington Fayette County Food and Beverage Association, a local industry trade group, felt that such a stringent smoking regulation would result in not only a loss of revenue for many of its members but also an unfair loss of control over their businesses as well. The association filed suit against the urban county council claiming the council did not have the authority to take such action. The association, seeking to prevent the ordinance from going into effect, was successful in

obtaining a temporary injunction as the case made its way up to the highest court in the Commonwealth.

The Supreme Court framed its resolution of the controversy around two major issues. The first was whether or not an ordinance that bans smoking in almost all buildings open to the public is a proper exercise of police power by a local government. The second was whether or not state law preempts the local regulation of tobacco use. A secondary issue involved whether a parallel ban on smoking paraphernalia in the affected businesses was constitutional.

The court first made it clear that Lexington, as a municipality, was well within its traditional authority to regulate for the general welfare when it enacted the ordinance. The court stated, "Among the police powers of government, the authority to promote and safeguard the public health is a high priority."<sup>4</sup> The court found that a ban on smoking aimed at the negative effects of second-hand smoke was a valid health issue for local governments to address and compared it to the fluoridation of the public water supply, a practice the court had previously upheld.<sup>5</sup>

The association argued that the ordinance was an impermissible governmental interference with individual rights and as such was invalid. In particular, the association argued the ordinance intruded upon the rights of business owners to conduct their businesses as they see

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# DIRECTOR'S DESK

“The General Assembly may provide by general law that cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city and not in conflict with a constitutional provision or statute.” So reads section 156b of the Kentucky Constitution, the constitutional basis of home rule for cities in the commonwealth. Before the amendment, cities’ home-rule powers derived from statute alone, as so-called county home rule does still today.

Section 156b was one of a set of amendments relating to local government passed by the General Assembly in April 1994 and ratified by the electorate that November. Perhaps appropriately, in this tenth anniversary year we have witnessed both the robustness and the fragility of home rule in Kentucky.

As reported in this issue, the Supreme Court recently held that a local government has the authority to enact an ordinance that prohibits smoking in public buildings to protect the public from the dangers of second-hand smoke. The court recognized that the grant of the police power affords local government wide latitude to promote the health, safety, morals and general welfare of the community. Concurrent local regulation is valid, said the court, unless it is unreasonable and oppressive and, importantly from the home-rule perspective, conflicts with state regulation. The court carefully examined the ordinance against state statute and regulation and found no conflict.

This victory for home rule in the courts, however, may turn out to be temporary. The same statute in which the General Assembly grants cities the police power provides that a city may not exercise the power if expressly prohibited by a statute. While the case was pending, several bills were introduced in the General Assembly that would prevent local smoking bans such as this one. None passed, but the sponsor of one is reported to have said

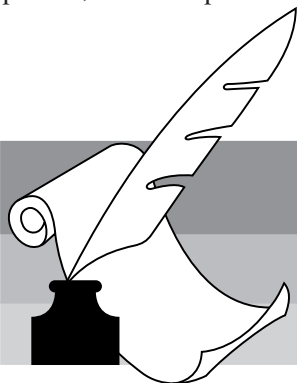
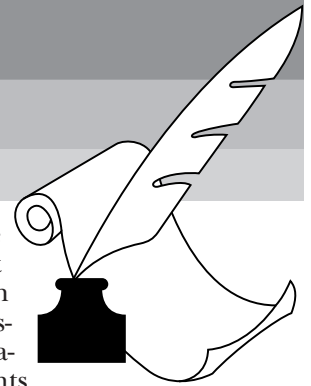
that perhaps the court’s ruling would solve the problem and, if not, a similar bill might fly next session.

A legislative override of home rule is not a new idea. Recent examples include legislation on Jefferson County’s vehicle emissions testing program and legislation requiring local governments

to sell confiscated weapons instead of destroying them. Perhaps the most memorable override occurred in 1984 when the General Assembly passed a law prohibiting local gun-control measures more stringent than the state’s. The state had none.

In that vein, this session saw the legislature preempt local zoning restrictions on gun dealers and manufacturers. The bill allows gun dealers and manufacturers to locate in any area zoned for business use. The effect is not only to make gun sales and manufacturing a permissible use in any business zone but also to allow those uses in residential zones where home occupations are a permissible use. Uses of land are among the most local of decisions and go to the core of home rule. However, the legislature did not see it that way. According to Senator Katie Stine, it was instead an issue of the Second Amendment right to bear arms.

Home rule draws a connection between local governance and certain more fundamental values such as accountability, political liberty, flexibility and preservation of local identity. Putting home rule in the constitution implicitly enshrined those values. Home rule affords individuals a greater opportunity to shape the rules governing their affairs. Home rule fosters democracy by diffusing power away from the center. Home rule promotes social, cultural and political experimentation, thereby preserving diversity in the larger polity. In the end, home rule is about respect for the internal divisions of the commonwealth. The question is not whether the General Assembly can preempt local government but whether it should. Prudence suggests that General Assembly should go there sparingly, for in the tension between state and local government power lays the promise of liberty. Home rule is important not because local government is important but because individual freedom is.



fit and for customers to patronize the businesses of their choice. The court strongly disagreed with this proposition. The court found that when the exercise of police power involves the public health, the rights of individuals must sometimes yield, even to the extent of the destruction of property interests if necessary. The issue, said the court, is one of reasonableness. In this case, Lexington held extensive public hearings involving all sides and found no evidence of adverse economic effect from such a ban. Thus, the ordinance was a reasonable exercise of Lexington's police power to protect the public health.

The court also found that Kentucky's home-rule laws favored Lexington's exercise of its police power to enact the ban. Under home rule, a local government can legislate for any valid public purpose without specific statutory authorization so long as it is not in conflict with state law. Under KRS 67A.070(2), applicable to urban county governments, a local ordinance is only deemed in conflict with state law if it "authorizes that which is expressly prohibited by a general statute" or "there is a comprehensive scheme of legislation on the same subject" at the state level.

The association argued that Lexington's regulation of smoking in restaurants and bars was preempted by the Kentucky Food, Drug, and Cosmetic Act.<sup>6</sup> That act establishes a uniform Retail Food Code<sup>7</sup> that regulates all food service establishments for the purpose of protecting the public health. Similarly, the association argued that the ordinance was preempted by KRS 438.305 to 438.340, which deal with the sale, distribution and use of tobacco products throughout Kentucky. In addition, the association identified several other individual state statutes that regulate smoking.<sup>8</sup> Taken together, the association argued, these state laws indicate a legislative intent by the General Assembly to occupy the field of smoking regulation in Kentucky.

The court found these arguments unpersuasive. The court pointed out that the Retail Food Code applies only to tobacco use as it relates to food preparation, not to the quality of air found in the businesses themselves. It also found that KRS 438.305 to 438.340 target the prevention of youth smoking, and the other statutes were an unrelated collection of laws covering narrow areas involving smoking. Therefore, the court found, there is no comprehensive scheme of state legislation on indoor smoking or second-hand smoke related to the public health. The

court also made it clear that there is no direct conflict between state law and Lexington's ordinance and that the "mere presence of the state in a particular area of law or regulation will not automatically eliminate local authority to enact appropriate regulations."<sup>9</sup>

Although the court upheld Lexington's authority to enact a public smoking ban, it did find one of the provisions of the ordinance unconstitutional. Section 14-99(3) banned all "smoking paraphernalia" from buildings open to the public. The court found this section to be unconstitutionally vague because it did not adequately define smoking paraphernalia. It pointed out, for example, that under the section as written stores such as Wal-Mart or Kroger could be fined for selling ashtrays, or even cigarettes for that matter. Despite this flaw, however, the ordinance contained a severability provision, and the court found the invalidity of one of its sections did not render the entire ordinance void.

In holding that Lexington has the authority to enact a smoking ban in all enclosed buildings open to the public, the Supreme Court made it clear that local governments in Kentucky have broad authority to regulate second-hand smoke to protect the public health. Therefore, each individual community is free to pursue a smoking policy as it sees fit. As the court succinctly stated, "Such policy questions are completely within the province of the local legislative body... Any dissatisfaction can be raised at the ballot box."<sup>10</sup>

### Endnotes

1. Kevin D. McManis is a 2004 graduate of the Salmon P. Chase College of Law. He participated in the Local Government Law Center Clinical Internship Program and more recently served an externship with a justice of the Kentucky Supreme Court.
2. Lexington-Fayette Urban County Code of Ordinances §§ 14-97 to 14-104.
3. One prominent exception is for designated smoking areas in governmental office buildings as mandated by KRS 61.165.
4. *Lexington Fayette County Food and Beverage Association*, 131 S.W.3d at 749.
5. See *Graybeal v. McNevin*, 439 S.W.2d 323 (Ky. 1969).
6. KRS 217.005 to 217.215.
7. 902 KAR 45:005.
8. See, e.g., KRS 438.050 (schools) and KRS 196.245 (correctional facilities).
9. *Lexington Fayette County Food and Beverage Association*, 131 S.W.3d at 750.
10. *Lexington Fayette County Food and Beverage Association*, 131 S.W.3d at 749.

# THE 2004 KENTUCKY GENERAL ASSEMBLY: A TOPICAL REVIEW OF SELECTED ACTS AFFECTING LOCAL GOVERNMENTS

## A NOTE ON EFFECTIVE DATES

“[L]egislation (except for general appropriation measures and those containing emergency or delayed effective date provisions) passed during the 2004 Regular Session of the Kentucky General Assembly will be *effective on the first moment of Tuesday, July 13, 2004*.” Opinion of the Attorney General 04-002 at pages 2-3.

## ADMINISTRATIVE PROCEDURES

AN ACT relating to administrative regulations. Enacts the Small Business and Government Regulatory Fairness Act of 2004 by amending KRS 11.202 and various sections of KRS Chapter 13A to change the definition of economic impact to include small business and government and to require that agencies e-mail proposed administrative regulations that impact small business to the Commission on Small Business Advocacy and those that impact government to local governments. House Bill 609 (Acts Ch. 185).

## ALCOHOLIC BEVERAGES

AN ACT relating to alcoholic beverages. Adds a new section to KRS Chapter 243 and amends other sections to authorize certain counties, consolidated local governments and cities to issue “limited restaurant” and “limited golf course” alcoholic beverage licenses. House Bill 466 (Acts Ch. 20).

## BUSINESS REGULATION

AN ACT relating to home inspectors. Adds new sections to KRS Chapter 198B to establish a licensing scheme for home inspectors. Creates a board of home inspectors, establishes standards for licensure, preempts local requirements for registration or licensure of home inspections, provides penalties for violations, creates a statute of limitations for actions arising from home inspections, and amends KRS Chapter 411 to make provision for notice and opportunity to cure. Senate Bill 34 (Acts Ch. 109).

AN ACT relating to electrical licensing and declaring an emergency. Amends KRS 227.480 to require that no permit issue unless, with certain exceptions, the ap-

plicant submits proof of being licensed as an electrical contractor or of acting on behalf of a licensed electrical contractor; amends certain provisions of KRS Chapter 227A, the licensing act, in part to provide that no master electrician may serve as the full-time master electrician of more than one electrical contractor who is not a master electrician. House Bill 461 (Acts Ch. 81).

## CITIES

AN ACT relating to the taxation of abandoned urban property. Adds a new section to KRS Chapter 92 and makes conforming amendments to other provisions to allow cities of all classes, not just the first class, to levy a separate rate of taxation on abandoned urban property higher than the prevailing rate of taxation on other real property in the city. House Bill 373 (Acts Ch. 76).

AN ACT relating to the preparation of maps for the annexation, transference, or severance of land by cities. Amends KRS 81A.470 to set forth additional requirements for the map prepared if the limits of a city are enlarged or reduced. House Bill 619 (Acts Ch. 166).

## COMMONWEALTH

AN ACT proposing an amendment of the Constitution of Kentucky by creating a Section 233A relating to marriage. Proposes an amendment to the constitution to read, “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” Senate Bill 245 (Acts Ch. 128).

AN ACT relating to lost and missing children. Adds new sections to KRS Chapter 199 to establish the “Code Adam” safety protocol in state buildings. House Bill 251 (Acts Ch. 21).

## COUNTIES

AN ACT relating to county detectives. Amends KRS 69.360 to confer on county detectives in counties containing a consolidated local government the power of arrest in the county and the right to execute process statewide and requires such county detectives to be certified in

accordance with KRS 15.380 to 15.404. House Bill 703 (Acts Ch. 172).

## **COURTS**

AN ACT relating to children. Amends KRS 610.345 to require that in certain instances involving a youthful offender, the judge of the court shall cause notice to be sent to authorities at the child's school and directs the school's use of the information; amends 158.155 concerning the notice sent from a child's previous school to his or her new school. Senate Bill 52 (Acts Ch. 185).

## **CRIME AND CRIMINAL JUSTICE**

AN ACT relating to crimes and punishments. Creates the crime of criminal simulation in the first degree, a Class D felony, for knowingly manufacturing, marketing, or distributing any product that is intended to defraud a test designed to detect the presence of alcohol or a controlled substance. Senate Bill 86 (Acts Ch. 94).

AN ACT relating to the protection of unborn children and declaring an emergency. Establishes a new KRS Chapter 507A and creates four new crimes relating to fetal homicide. House Bill 108 (Acts Ch. 1), effective February 20, 2004.

## **ECONOMIC DEVELOPMENT**

AN ACT relating to local industrial development authorities. Amends KRS 154.50-326 to provide that members of a joint industrial development authority can be chosen in a manner established by an agreement entered into between the legislative bodies of the affected cities and counties. Senate Bill 203 (Acts Ch. 43).

AN ACT relating to rural economic development and declaring an emergency. Amends KRS 154.22-040 to provide that its wage computation requirements do not apply to eligible nonprofit corporations whose employees are handicapped and sheltered workshop workers employed at less than the established minimum wage as authorized by KRS 337.295. Senate Bill 231 (Acts Ch. 84), effective April 7, 2004.

AN ACT relating to economic development. Amends various sections of subchapter 26 of KRS Chapter 154 respecting the financing of existing industry development to change the percentage of recoverable approved costs, alter the tax credit offset, limit the job development assessment fee, open the license tax credit to negotiation,

and allow certain existing agreements to be reopened and amended. Senate Bill 248 (Acts Ch. 18).

## **EDUCATION**

See also Schools and School Districts; Teachers

AN ACT relating to education and declaring an emergency. Amends KRS 157.070 to allow certified and classified employees to make up days missed due to weather-related and other emergencies by working longer instructional hours with appropriate credit toward contractual obligations and retirement accruals. Senate Bill 28 (Acts Ch. 89), effective April 9, 2004.

A JOINT RESOLUTION relating to civic literacy. Urges the Office of the Secretary of State, with the assistance of the Department of Education and the Administrative Office of the Courts, to establish a committee to convene a Summit for Civic Literacy at Northern Kentucky University facilitated by the Scripps Howard Center for Civic Engagement with the goal of determining a strategy for enhancing long-term civic engagement and literacy within the commonwealth. Senate Joint Resolution 80 (Acts Ch. 91).

AN ACT relating to children with disabilities. Amends KRS 159.030 to provide that a district board of education may grant an exemption from compulsory attendance in certain instances involving a chronic physical condition. House Bill 10 (Acts Ch. 46).

AN ACT relating to the awarding of high school diplomas. Amends KRS 158.140 to require local boards of education to award high school diplomas to certain honorably discharged veterans of the Korean War and amends KRS 156.160 to provide that if a school offers the Reserve Officers Training Corps program, the course shall be accepted as meeting the physical education requirement for high school graduation. House Bill 113 (Acts Ch. 97).

## **ELECTIONS**

AN ACT relating to school board elections. Amends KRS 160.210 to provide that, if no candidate files a petition of nomination for a county board of education opening, the chief state school officer shall fill the new term of office and to provide that, unless a number of candidates equal to or greater than the number of positions to be filled file petitions for nomination for an independent board of education opening, the chief state school officer shall fill the new term of office for all openings that have no candidate filings. House Bill 398 (Acts Ch. 197).

## **FIRE SERVICE**

AN ACT relating to fire safety. Requires disclosure to a lessee of on-campus housing whether the premises are equipped with an automatic fire suppression system. Senate Bill 63 (Acts Ch. 110).

AN ACT relating to private investigators and declaring an emergency. Amends various provisions of KRS Chapter 329A to require, in part, that if the applicant intends to conduct fire or arson investigations he must provide proof of certification by the National Association of Fire Investigators or the International Association of Arson Investigators. Senate Bill 75 (Acts Ch. 188), effective April 22, 2004.

AN ACT relating to volunteer fire department trustees. Amends KRS 75.031 to remove the restriction that no more than one of the two firefighter trustees may be an employee of the fire protection district or volunteer fire department district. Senate Bill 195 (Acts Ch. 92).

AN ACT relating to fireworks. Amends KRS 227.710 to include within its scope the use of pyrotechnic devices or pyrotechnic materials before a proximate audience whether indoors or outdoors, amends KRS 227.715 to increase the fee to sell fireworks, and amends KRS 227.720 to increase the amount of liability insurance the holder of a fireworks permit must carry. Senate Bill 273 (Acts Ch. 70).

AN ACT relating to fire protection districts. Amends KRS 75.040 to allow a fire protection district or a volunteer fire department district that establishes and operates an emergency ambulance service and is the primary service provider in the district to levy a tax upon the property in the district not to exceed 20 cents per \$100 of valuation as assessed for county taxes. House Bill 406 (Acts Ch. 151).

AN ACT relating to the merger of fire protection districts. Amends KRS 75.020 to delete the two-year moratorium on new petitions to merge or change territorial boundaries following a merger. House Bill 412 (Acts Ch. 19).

AN ACT relating to fire departments and making an appropriation therefore. Amends KRS 95A.262 and 95A.220 to allot \$1,000,000 in fiscal years 2004-2005 and later from the Firefighters Foundation Program Fund for use by the Commission on Fire Protection Person-

nel Standards and Education to conduct training-related activities. House Bill 435 (Acts Ch. 71).

AN ACT relating to collective bargaining. Adds new sections to KRS Chapter 67A to allow firefighters and police officers in Lexington-Fayette Urban County Government to join or organize a labor union and to collectively bargain. House Bill 572 (Acts Ch. 100).

## **LAW ENFORCEMENT**

See also Crime and Criminal Justice; Police

AN ACT relating to drug control. Amends various sections of and adds new sections to KRS 218A pertaining to controlled substances in part to allow law enforcement agencies to share reports received from the electronic system for monitoring controlled substances established by the Cabinet for Health Services and to allow judges and probation and parole officers to receive reports for certain purposes. Senate Bill 14 (Acts Ch. 107).

AN ACT relating to firearms and ammunition. Amends KRS 237.110 to allow active duty members of the armed forces posted in Kentucky to apply for concealed deadly weapon license and amends KRS 16.220 to allow certain grant monies from the Department for Local Government to be used to purchase firearms and ammunition as well as body armor. Senate Bill 83 (Acts Ch. 86).

AN ACT relating to crimes and punishments. Creates the crime of criminal simulation in the first degree, a Class D felony, for knowingly manufacturing, marketing, or distributing any product that is intended to defraud a test designed to detect the presence of alcohol or a controlled substance. Senate Bill 86 (Acts Ch. 94).

AN ACT relating to services for individuals with brain injuries or malfunctions and making an appropriation therefore. In part, adds a new section to KRS Chapter 210 charging the Cabinet for Health Services to create a telephonic behavioral health jail triage system to screen prisoners for mental health risk issues, including suicide risk. House Bill 157 (Acts Ch. 137).

## **MOTOR VEHICLES**

AN ACT relating to personal motor vehicle insurance database. Amends various sections of KRS and adds others to assist in identifying uninsured motor vehicles; provides that on and after January 1, 2006, a county clerk shall not issue appropriate documents of title or registration

for any personal motor vehicle if Automated Vehicle Information System does not list the vehicle identification number of the personal motor vehicle as an insured vehicle. House Bill 29 (Acts Ch. 130).

AN ACT relating to special military license plates. Amends KRS 186.041 and 186.050 to allow the use of special military-related license plates on motorcycles. House Bill 92 (Acts Ch. 30).

## **OFFICERS AND EMPLOYEES**

AN ACT relating to military discharge papers. Amends KRS 422.090 to alter the procedures county clerks are to follow in recording military discharge papers; to provide that an index is, but the discharge papers themselves are not, a public record; to specify the persons who may inspect the discharge papers; and to provide for the destruction of the discharge papers. House Bill 225 (Acts Ch. 52).

AN ACT relating to retirement. Amends various sections of KRS Chapters 16 and 61 to modify the benefits available under certain pension plans including the County Employees Retirement System for persons whose participation begins after August 1, 2004. House Bill 290 (Acts Ch. 33).

AN ACT relating to collective bargaining. Adds new sections to KRS Chapter 67C to allow firefighters and police officers in Lexington-Fayette Urban County Government to join or organize a labor union and to collectively bargain. House Bill 572 (Acts Ch. 100).

## **POLICE**

AN ACT making an appropriation to local government public safety and declaring an emergency. Adds new sections to KRS Chapters 23A and 24A to increase the court costs in criminal cases an additional \$20 and to allocate the new revenues to local governments for payment of expenses for the operation of the local police departments or contracted police services and to counties for housing or the transporting of prisoners. House Bill 413 (Acts Ch. 78), effective April 7, 2004.

AN ACT relating to collective bargaining for police officers in a consolidated local government. Adds new sections to KRS Chapter 67C to grant police officers employed by a consolidated local government the right to engage in collective bargaining and specifies that the

mayor of a consolidated local government or his designee shall represent the consolidated local government in collective bargaining with the labor organization designated by the Labor Cabinet as the exclusive representative of the police officers. House Bill 570 (Acts Ch. 101).

AN ACT relating to collective bargaining. Adds new sections to KRS Chapter 67A to allow firefighters and police officers in Lexington-Fayette Urban County Government to join or organize a labor union and to collectively bargain. House Bill 572 (Acts Ch. 100).

## **PUBLIC HEALTH AND SAFETY**

AN ACT relating to animals. Adds a new section to KRS Chapter 258 to prohibit the use of gunshot as a form of euthanasia and amends numerous sections of the chapter respecting rabies vaccinations, the Animal Control Advisory Board, animal control officers, impoundments, animal control programs, and responsibilities of owners. Senate Bill 133 (Acts Ch. 189).

AN ACT relating to sewer systems. Repeals KRS 65.115 and adds a new section of KRS Chapter 65 without the exclusion for urban counties to require just compensation where a local government that provides sewage treatment services takes over customers of another sewage treatment utility and to grant the power of eminent domain over sewage treatment facilities. House Bill 202 (Acts Ch. 53).

## **ROADS AND HIGHWAYS**

AN ACT relating to roads. Amends various sections of KRS Chapter 178 to prescribe certain standards and procedures applicable to roads included in the county road system; repeals section 178.155. House Bill 199 (Acts Ch. 61).

## **SCHOOLS AND SCHOOL DISTRICTS**

See also Education; Teachers

AN ACT relating to children. Amends KRS 610.345 to require that in certain instances involving a youthful offender, the judge of the court shall cause notice to be sent to authorities at the child's school and directs the school's use of the information, and amends 158.155 concerning the notice sent from a child's previous school to his or her new school. Senate Bill 52 (Acts Ch. 185).

AN ACT relating to excused absences from school. Amends KRS 159.035 to require a public school principal to give a student an excused absence of up to 10 school days to pursue an educational enhancement opportunity determined by the principal to be of significant educational value, including participation in an educational foreign exchange program or an intensive program in English, science, mathematics, social studies, foreign language, and the arts. Senate Bill 80 (Acts Ch. 87).

AN ACT relating to fines for traffic offenses. Amends KRS 189.394 to double fines for speeding in a school zone where flasher lights have been installed and are flashing. Senate Bill 85 (Acts Ch. 98).

AN ACT relating to school councils. Adds a new section to KRS Chapter 160 to require a school with a school council identified as needing improvement to include within its school improvement plan actions to strengthen the school council and the school-based decision-making process at the school and to direct a scholastic audit team to include certain specific matters and recommendations in its review including a recommendation about the transfer of authority from the school council to the superintendent. Senate Bill 111 (Acts Ch. 188).

AN ACT relating to health services and declaring an emergency. In part amends KRS 158.832, 158.834, and 158.836 to allow students at risk of anaphylaxis to possess medication to treat anaphylaxis and to self-administer the medication. House Bill 90 (Acts Ch. 132), effective as to anaphylaxis April 22, 2004.

AN ACT relating to school finance. Adds new sections to KRS 160.613 to 160.617 and amends existing sections to require the Revenue Cabinet to collect and administer the utilities gross receipts tax on behalf of school districts and to prescribe the applicable procedures. House Bill 163 (Acts Ch. 79).

AN ACT relating to school accountability. Amends KRS 158.6455 to set forth when a student's test scores are to be counted in the accountability index of a school, a school district, and the state. House Bill 176 (Acts Ch. 58).

AN ACT relating to student dropouts. Amends KRS 158.145 and 158.6455 to adjust the calculation of the dropout rate and amends KRS 158.146 to provide that no state or federal funds for adult education and literacy shall be used to pay for a high school student enrolled in a program leading to a certificate of completion or a GED diploma. House Bill 178 (Acts Ch. 103).

AN ACT relating to school employees' sick leave. Amends KRS 161.155 to require local school boards to award a minimum of 10 days sick leave during the school year to all full-time classified employees as well as to full-time certified employees. House Bill 309 (Acts Ch. 145).

AN ACT relating to school-board elections. Amends KRS 160.210 to provide that, if no candidate files a petition of nomination for a county board of education opening, the chief state school officer shall fill the new term of office and to provide that, unless a number of candidates equal to or greater than the number of positions to be filled file petitions for nomination for an independent board of education opening, the chief state school officer shall fill the new term of office for all openings that have no candidate filings. House Bill 398 (Acts Ch. 197).

AN ACT relating to certified employees called to active military service. Adds a new section to KRS Chapter 161 to provide that a certified employee of a local board of education who is called to active military duty shall be granted a leave of absence for this purpose and shall be considered to be rendering service to the state and to provide for continuation of benefits. House Bill 551 (Acts Ch. 161).

## **SPECIAL PURPOSE GOVERNMENTS**

AN ACT relating to local industrial development authorities. Amends KRS 154.50-326 to provide that members of a joint industrial development authority can be chosen in a manner established by an agreement entered into between the legislative bodies of the affected cities and counties. Senate Bill 203 (Acts Ch. 43).

AN ACT relating to airport safety and security. Amends KRS 183.187 pertaining to the contractual powers of an airport board to provide that any board need not accept performance from an entity other than the entity with which it originally contracted unless the airport board has specifically so consented after review of such factors as the impact of the assignment upon airport safety and security. House Bill 331 (Acts Ch. 83).

AN ACT relating to fire protection districts. Amends KRS 75.040 to allow a fire protection district or a volunteer fire department district that establishes and operates an emergency ambulance service and is the primary service provider in the district to levy a tax upon the property in the district not to exceed 20 cents per \$100 of valuation as assessed for county taxes. House Bill 406 (Acts Ch. 151).

## TAXATION

AN ACT relating to the insurance premium tax. Amends KRS 91A.080 to provide that the tax imposed under it does not apply to premiums paid to insurers of municipal bonds, leases, or other debt instruments issued by or on behalf of a city, county, charter county government, urban-county government, consolidated local government, special district, nonprofit corporation, or other political subdivision of the commonwealth unless the bonds, leases, or other debt instruments are issued for profit or on behalf of for-profit or private organizations. House Bill 19 (Acts Ch. 28).

AN ACT relating to the taxation of abandoned urban property. Adds a new section to KRS Chapter 92 and makes conforming amendments to other provisions to allow cities of all classes, not just the first class, to levy a separate rate of taxation on abandoned urban property higher than the prevailing rate of taxation on other real property in the city. House Bill 373 (Acts Ch. 76).

AN ACT relating to fire protection districts. Amends KRS 75.040 to allow a fire protection district or a volunteer fire department district that establishes and operates an emergency ambulance service and is the primary service provider in the district to levy a tax upon the property in the district not to exceed 20 cents per \$100 of valuation as assessed for county taxes. House Bill 406 (Acts Ch. 151).

AN ACT relating to the taxing authority of emergency services boards. Amends KRS 65.670 to allow an emergency services board to collect up to 10 cents per \$100 of assessed valuation for each special district whose board is merged. House Bill 427 (Acts Ch. 152).

AN ACT relating to local taxation. Amends various provisions enacted in the 2003 Session (HB 107) that established a uniform structure for the allocation and apportionment of local tax revenue among multiple taxing districts and established guidelines for paying of local taxes and filing local tax returns to clarify certain provisions of 2003 HB 107 and establishes penalties for unauthorized inspection of confidential taxpayer information and divulging confidential taxpayer information. House Bill 458 (Acts Ch. 63).

AN ACT relating to delinquent taxes. Amends various sections to make provision for disposition of delinquent taxes of a former city of the first class in a consolidated local government. House Bill 510 (Acts Ch. 104).

## TEACHERS

AN ACT relating to the Education Professional Standards Board. Amends KRS 160.350 pertaining to a superintendent's certificate to update its provisions, amends KRS 161.028 and 161.048 to harmonize alternative certification programs and add new options. House Bill 152 (Acts Ch. 117).

AN ACT relating to retired teachers and declaring an emergency. Amends numerous provisions of KRS Chapter 161 and various other provisions to update the operations of the Kentucky Teachers' Retirement System, to establish an employer medical insurance fund stabilization contribution, and to provide state General Fund support for a cost-of-living increase for eligible retirees. House Bill 434 (Acts Ch. 121), effective July 1, 2004.

## TELECOMMUNICATIONS

AN ACT relating to wireless communications. Amends KRS 11.5162 and 11.5263 to extend the reach of the Kentucky Wireless Interoperability Executive Committee to include local government and provide that local governments shall present project plans for primary wireless public safety voice or data communications systems for review and recommendation by the committee. House Bill 226 (Acts Ch. 48).

## ZONING, PLANNING, AND LAND USE

AN ACT relating to zoning. Adds a new section to KRS Chapter 100 to prevent any local government from using the zoning process to prohibit a federally licensed firearms manufacturer, importer, or dealer from locating at any place within the jurisdiction at which any other business may locate or to enact restrictions that could be reasonably construed to solely affect federally licensed firearms manufacturers, importers, or dealers. Senate Bill 95 (Acts Ch. 187).

AN ACT relating to the Airport Zoning Commission. Amends KRS 183.861 to expand the commission's jurisdiction to include all state-licensed, private use airports that have a paved runway in excess of 2,900 feet. Senate Bill 142 (Acts Ch. 112).

AN ACT relating to land use. Amends KRS 100.111 to include within the definition of agricultural use the use of certain tracts of land for activities involving horses and providing that they may be subject to regulation as a conditional use. House Bill 404 (Acts Ch. 150).

# BE IT ORDAINED . . .

As reported in a story elsewhere in this newsletter, the Kentucky Supreme Court recently upheld an ordinance of the Lexington-Fayette Urban County Government that prohibits smoking in places of public accommodation. *Lexington Fayette County Food and Beverage Association v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745 (Ky. 2004). Here is that ordinance.

## Charter and Code of Ordinances Urban County Government of Lexington-Fayette Chapter 14 Offenses and Miscellaneous Provisions Sections 14-97 to 14-104

### Sec. 14-97. Regulation of smoking indoors – Definitions.

For the purpose of sections 14-97 to 14-104, the following definitions shall apply unless the context clearly indicates or requires a different meaning:

(1) *Building*. Any structure enclosed from the weather, whether or not windows or doors are open. If a person leases or possesses only a portion of a building, the term “building” applies to the leasehold or possessory interest as well.

(2) *Dwelling*. Any place used primarily for sleeping overnight and conducting activities of daily living, including, without limitation, a hotel or motel room or suite or a hospital, hospice or nursing home room, but not a hotel, motel, hospital, hospice or nursing home lobby, common elevator, common hallway or other common area.

(3) *Enclosed area*. An area that:  
(a) Is closed in overhead by a roof or other covering of any material, whether permanent or temporary; and  
(b) Has forty (40) percent or more of its perimeter closed in by walls or other coverings of any material, whether permanent or temporary.

(4) *Private organization*. An establishment which maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest and is not profit oriented.

(5) *Retail tobacco store*. A retail store devoted primarily to the sale of any tobacco product, including but not limited to cigarettes, cigars, pipe tobacco and chewing tobacco,

and accessories and in which the sale of other products is merely incidental. The sale of such other products shall be considered incidental if such sales generate less than fifty (50) percent of the total annual gross sales.

(6) *Smoke or smoking*. The act of inhaling or exhaling the smoke from any lighted cigarette, cigar, or pipe, or other combustible tobacco product.

(7) *Tobacco warehouse*. Any warehouse building offering tobacco for purchase at auction and meeting the definition established in KRS 248.010(4).

### Sec. 14-98. Same – Prohibition; exceptions.

(1) No person shall smoke within any building except in one (1) of the following locations:

(a) In any dwelling. This exception does not extend to a lobby, common elevator, common hallway, or any other common area of a building containing attached dwelling units, hotel room or motel rooms, but if a hospital, hospice, or nursing home permits smoking in its dwelling rooms, smoking is not allowed in any room shared with a non-smoker without that person’s consent.

(b) In a room or hall being used by a person or group for a private social function that is not open to the public, in any room used for psychological treatment of nicotine addiction by a licensed health care professional, or in a physically separate and independently ventilated room in a hospital, hospice, or nursing home open to all residents as a smoking room and for no other purpose.

(c) In a retail tobacco store.

(d) A performer as part of a theatrical production so long as adequate notice is provided patrons both before the performance and by specific signage at the theater.

(e) Indoor smoking areas provided in governmental office buildings or workplaces pursuant to KRS 61.165.

(f) Facilities operated by private organizations.

(g) In a tobacco warehouse.

(2) Nothing in this chapter shall prevent an owner, lessee, principal manager or person in control of any place, including, without limitation, any motor vehicle, outdoor area, or dwelling, from prohibiting smoking completely in such place, and no person shall fail to abide by such a private prohibition.

(3) Nothing in this chapter shall authorize smoking in any place where it is otherwise prohibited by statute, ordinance, regulation or by order of the fire marshal.

**Sec. 14-99. Same – Responsibilities of owners, lessees, principal managers or other persons in control of establishments.**

(1) No owner, lessee, principal manager, or person in control of a building or an establishment in any building open to the public shall fail to post signs, with letters of not less than one (1) inch high or symbols no less than three (3) inches high, using the words “No Smoking” or the international “No Smoking” symbol consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it conspicuously either on all public entrances or in a position clearly visible on entry into building or establishment.

(2) The owner, operator, manager, or designee or employee of every establishment in a building open to the public shall inform persons violating this chapter of the applicable provisions thereof and require compliance.

(3) All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited by sections 14-97 to 14-104 and shall not be permitted by the owner, operator, manager or other person having control of the establishment. Any permanent structure that functioned or was used as an ashtray shall be disabled or altered to prevent its use as an ashtray.<sup>1</sup>

(4) The requirements of this section do not apply to any exempt dwelling.

**Sec. 14-100. Same – Owners, lessees, principal managers, etc., to ensure compliance with chapter.**

(1) No owner, lessee, principal manager, or person in control of a building or establishment shall fail to:

- (a) Ask smokers to refrain from smoking in any no-smoking area;
- b) Use any other legal means which may be appropriate to further the intent of this chapter.

(2) No owner, principal manager, proprietor, or any other person in control of a business shall fail to ensure compliance by subordinates, employees, and agents with this chapter.

**Sec. 14-101. Same – Enforcement.**

Enforcement of sections 14-97 to 14-104 shall be by citation issued by the Lexington-Fayette Urban County Health Department. Notice of the provisions of the chapter shall be given by the Lexington-Fayette Urban County Government to all applicants for a business or other license.

**Sec. 14-102. Same – Violations; penalties.**

(1) Any person who violates any provision of sections 14-97 to 14-104, including a person who smokes in an area where smoking is prohibited, shall be subject to the following penalties:

(a) A fine of one hundred dollars (\$100.00) for the first offense;

(b) A fine of two hundred fifty dollars (\$250.00) for the second offense;

(c) A fine of five hundred dollars (\$500.00) for the third and each subsequent offense.

(d) Persons who smoke in an area where smoking is prohibited and who refuse to extinguish their smoking material when asked, may be required to leave the premises, and shall be subject to prosecution for trespass if they do not leave when asked.

(2) Each calendar day during which the violation occurs shall constitute a separate and distinct offense.

**Sec. 14-103. Same – Smoking near building entrances, etc.**

Smoking is prohibited within a reasonable distance from the outside entrance to any building so as to ensure that tobacco smoke does not enter the building through entrances, windows, ventilation systems, or other means.

**Sec. 14-104. Same – Discrimination prohibited.**

No person or employer shall discharge, refuse to hire, or in any manner retaliate against an employee, applicant for employment, or customer because that employee, applicant, or customer exercises any rights afforded by sections 14-97 to 14-104.

**Endnotes**

1. Editor’s note: The court found this provision to be unconstitutionally vague because the ordinance did not define or otherwise clarify the meaning of “smoking paraphernalia.” The court said, “The council could easily rectify the discontinuity between what Section 14-99(3) says and how they intend to enforce it by appropriately defining ‘smoking paraphernalia’ and amending Section 14-99(3) to require the removal of ‘smoking paraphernalia intended for use on the premises from any area where smoking is prohibited by Sections 14-97 to 14-104[.]’” *Lexington Fayette County Food and Beverage Association v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745, 753 (Ky. 2004).

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