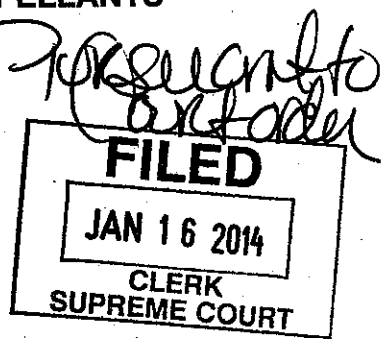
SUPREME COURT OF KENTUCKY
2013-SC-000023-D

BULLITT COUNTY FISCAL COURT, Bullitt County, Kentucky **APPELLANTS**
CITY OF MT. WASHINGTON, CITY OF SHEPHERDSVILLE
CITY OF HILLVIEW, CITY OF LEBANON JUNCTION
CITY OF PIONEER VILLAGE, CITY OF HEBRON ESTATES
CITY OF HUNTER'S HOLLOW AND CITY OF FOX CHASE



FROM THE BULLITT CIRCUIT COURT
THE HONORABLE RODNEY D. BURRESS, JUDGE
V. **NO. 11-CI-00348**
AND ON DISCRETIONARY REVIEW FROM
THE KENTUCKY COURT OF APPEALS
NO. 2011-CA-001798

BULLITT COUNTY BOARD OF HEALTH **APPELLEE**

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE, THE BULLITT COUNTY BOARD OF HEALTH, SUBMITTED ON BEHALF OF AMICI CURIAE: CLARK COUNTY BOARD OF HEALTH MADISON COUNTY BOARD OF HEALTH WOODFORD COUNTY BOARD OF HEALTH

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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of this Amicus Curiae Brief were served upon the following named individuals by first-class mail, postage prepaid, on this the 30th day of December, 2013: Hon. Rodney D. Burress, Bullitt Circuit Judge, P.O. Box 97, Shepherdsville, KY 40165; and Monica Meredith Robinson, Bullitt County Attorney, 300 S. Buckman Street, Shepherdsville, KY 40165; Matthew Lemme, 275 Snapp Street, P.O. Box 285, Mt. Washington, KY 40047; Joseph J. Wantland, P.O. Box 515, Shepherdsville, KY 40165; and Mark Edison, 216 S. Buckman Street, Shepherdsville, KY 40165, Attorneys for Appellants; and Margaret A. Miller, Bingham Greenebaum Doll LLP, 300 W. Vine St., Suite 1100, Lexington, KY 40507, Attorney for Appellee.

COUNSEL FOR AMICI CURIAE

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INTRODUCTION

The Appellee, the Bullitt County Board of Health, adopted Regulation No. 10-01 pursuant to KRS 212.230(1)(c), prohibiting smoking inside certain public places and places of employment in Bullitt County, Kentucky. The Bullitt County Board of Health appealed the decision of the Bullitt Circuit Court invalidating that regulation. The Kentucky Court of Appeals reversed the decision of the Bullitt Circuit Court and upheld and validated the Bullitt County Board of Health's Clean Indoor Regulation in a decision rendered December 7, 2012, Case No. 2011-CA-001798. On October 16, 2013, this honorable appellate court entered an Order Granting Discretionary Review of that decision. Amici Curiae join with Appellee in support of the decision of the Kentucky Court of Appeals upholding the aforesaid regulation, and seek affirmation of the lower appellate court's ruling.

ARGUMENT

I. THE BULLITT COUNTY BOARD OF HEALTH ACTED WITHIN ITS AUTHORITY IN REGULATING SMOKING INSIDE CERTAIN PUBLIC PLACES AND PLACES OF EMPLOYMENT.

The clear intent of Kentucky law is to grant the local boards of health broad authority to regulate matters of public health. The authority of local boards of health to regulate matters pertaining to public health is set out by the General Assembly in at least three separate statutes contained in KRS Chapter 212.

Boards of Health are given a general grant of authority to adopt administrative regulations under KRS 212.230(1)(c), which provides that local boards of health may "Adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health." In addition, KRS 212.230(1)(h) authorizes local boards of health to "Perform all other functions necessary to carry out the provisions of law and the regulations adopted pursuant thereto, relating to local boards of health."

County boards of health may, under KRS 212.240(1) "Administer and enforce in the county and in all cities and towns situated therein, except as otherwise provided by law, all applicable public health laws of the Commonwealth and all of the rules and regulations of the secretary of the Cabinet for Health and Family Services and county board of health issued thereunder."

Finally, city and county or district health departments are given a final, general grant of authority: "Except as otherwise provided by law, do all other things reasonably necessary to protect and improve the health of the people." KRS 212.245(11).

The remarkable feature of these three sections of law is its sweeping scope. Kentucky courts have upheld in strong terms this broad grant of authority. In *Louisville & Jefferson County Board of Health vs. Haunz*, 451 S.W.2d 407 (Ky. App. 1970), the Court held that boards of public health enjoy broad regulatory power, limited primarily by procedural safeguards to control the exercise of power and provide for due process. *Haunz* cites with approval the publication of broad regulatory power in a variety of circumstances, including a billboard law, prevailing wages and programs for special education.

The Bullitt Circuit Court attempted to distinguish on merely the facts of the case, that *Haunz* raised the question of sanitary code affecting habitability of buildings, and not to smoking in a public workplace. But the primary holding, and overall intent, of *Haunz* directs just the opposite: that the circuit court ruled incorrectly when it struck down the health board's regulation by focusing, just as the Bullitt Circuit Court did, on whether or not the subject matter of the health board regulation was specifically provided for by statute. Instead, the *Haunz* court emphasized the importance of the procedural safeguards embedded within the law as a protection against latent overreaching by an overly-aggressive board of health.

In a succinct exposition of the standard which must be met to invalidate a regulation to protect public health, the *Haunz* court held:

> We are of the opinion that the regulations contained in the Sanitary Code are valid and are reasonably necessary to protect the health and welfare of the inhabitants of Jefferson County; that the regulations were adopted pursuant to enabling legislation; that sufficient safeguards are provided in the Sanitary Code to protect the public and to afford those affected by the code with "due process of law" and that the regulations are within the framework of the legislation, the purpose of which is to protect the public health.

Id. at 409. The Bullitt County Board of Health regulation to limit indoor smoking in certain public places and places of employment meets the *Haunz* standard: the regulation is reasonably necessary to protect the public health, the regulations were adopted pursuant to the enabling legislation of KRS 212.230(1)(c), and that adequate due process protections were built into the regulation to meet constitutional muster. And not only were due process considerations built into the regulation, due process was afforded at the outset of the regulation enactment process by virtue of the public hearings.

In the case *sub judice*, the trial court did not apply this standard, but merely tried to distinguish the case based on the narrow fact pattern without extracting the legal principle clearly enunciated by the *Haunz* court.

Because of how the Bullitt County case proceeded (initiated by a Motion for Declaration of Rights), questions of legality were addressed, but short shrift was given to the overriding, motivating driving force behind this, and all, smoking prohibition regulations -- the harmful, unhealthy effects of second-hand smoke. This bedrock basis for the Bullitt County Board of Health's action was merely

commented upon as if a mere nuisance, rather than it being recognized as justification for the enactment of the local law.

This was done because those seeking the declaration of rights knew, and even conceded, that the matter of second-hand smoke is, unquestionably and uncontrovertibly, a real, present, and significant health hazard.

In light of this concession, the Bullitt Circuit Court basically simply brushed this consideration aside. In its Order now on appeal, the trial court acknowledged the "negative consequences of smoking" (emphasis added), without further comment.

However, that one sentence evidenced the trial court's misunderstanding (and mishandling) of the issue. The issue isn't whether or not smoking is harmful to the smoker (emphasis added). That goes without saying. The action of the Bullitt County Board of Health relates, not to the effects of smoking suffered by the smoker, but to the effect of the second-hand smoke on those persons subjected to it -- the public (such as patrons), or persons left with no choice in today's brutal job market but to remain in a job where their health is compromised by second-hand smoke (emphasis added). At issue is the regulation of the (conceded) harmful effects of second-hand smoke by a board of health, not regulating the health of the smoker (he/she/they can smoke in their homes or their cars or at other private places to their hearts' content).

The fact that the Bullitt Circuit Court so missed this point was evidenced in the catch-all "Big Brother" closing comments. The trial court compared the issue of regulating second-hand smoke to the regulation of consumption of red meat.

Clearly, these matters are not one and the same. If a person in a restaurant is having a steak at the table next to me, his consumption of that meat does not negatively impact me one iota (perhaps other than making me wistful for a steak, also). However, his consumption of the steak may (for the sake of argument) eventually cause harm to him, but not to me. On the other hand, if he pulls out a cigarette and smokes it right next to me after he finishes his steak, as the movants for the initial declaration acknowledged, well, that does harm me (and the server, and others within range of the cigarette smoke).

It could not be more readily apparent, then, that the trial court's rationale was misguided, and just plain wrong.

II. KENTUCKY STATUTES GRANTING BROAD AUTHORITY TO BOARDS OF PUBLIC HEALTH ARE A LAWFUL DELEGATION OF ADMINISTRATIVE AUTHORITY.

The Kentucky General Assembly is granted the authority to create legislation by Sections 27 through 29 of the Kentucky Constitution. However, that is not to say that the General Assembly cannot delegate its authority to administrative agencies such as boards of public health. *Commonwealth v. Association of Industries of Kentucky*, 370 S.W.2d 584, 587 (Ky. 1963). Not only is delegation of legislative power permissible, but it is necessary. As the Court pointed out in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*, 352 S.W.2d 203 (Ky. 1961), when considering delegation of legislative authority to the state education department, such delegation is necessary for the practical needs of effective government. The *Butler* Court pointed out that the General Assembly meets only 60 days every two years (now yearly, of course), and have

"*neither the time, facilities or qualifications*" to do more than set out a general class of rules.

The *Butler* case is instructive. Even though its subject matter was education, the principles applied are relevant to boards of health. Specifically, the court observed, at page 208:

> Let us, then, examine this law in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice. The legislature wants to encourage and lend a modicum of support to the special education of a certain class of people. It does not wish, in so doing, to waste the taxpayers' money. The members of the legislature are allowed to meet in regular session only 60 days every two years. They have neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable. This body also is one of the most responsible and long-established agencies of the state government. Is there any real danger that it would, even if it could, abuse the responsibilities conferred upon it by this act? We think not.

Using the rationale of the *Butler* case, the board of health, like the department of education, is a long-established agency of government. Its work has been responsible for wide-ranging improvements in stemming the spread of communicable diseases, guaranteeing the safety of drinking water, and addressing the effects of debilitating chronic disease. There is no credible evidence of danger that has resulted, or reasonably would result, from the local health board's broad powers.

But the Bullitt Circuit Court, in the case at bar, opined that the Bullitt County Board of Health has engaged in lawmaking, rather than confining itself to the authority delegated to it by the General Assembly. The distinction between

delegation and lawmaking, however, is not as simple as the Bullitt Circuit Court opinion suggests. In earlier cases, the Kentucky Supreme Court makes this point: "[t]he principle is easy to state. Its application is difficult." *Legislative Research Commission ex rel Prather v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984). Because it is so difficult to determine whether an administrative agency has crossed into lawmaking, the Kentucky Court of Appeals has ruled that delegation of legislative authority is permissible when there are procedural safeguards to control the exercise of power and if it can withdraw the delegation. *Commonwealth, Cabinet for Human Resources, Dep't of Health Services v. Kanter*, 898 S.W.2d 508, 512 (Ky. App. 1995). The Bullitt Circuit Court merely ignores this and other authority which focuses on remedies for potential overreaching.

III. THE PRINCIPLES OF STATUTORY CONSTRUCTION DICTATE THAT A LOCAL BOARD OF HEALTH MAY ENACT A CLEAN INDOOR AIR REGULATION.

Kentucky law regulates matters of public health under Title XVIII. Title XVIII contains a number of chapters addressing wide-ranging matters pertaining to public health, from mental health to food safety to water plant operators. One of these chapters, 211, sets out the power, authority, and responsibility of state health programs, including those of the Cabinet for Health and Family Services. Within Chapter 211, mention is made of local boards of health and the role they play vis-à-vis the Cabinet.

The following chapter, 212, is entitled "Local Health Programs," and sets out the power, authority and responsibility of local boards of public health.

These two chapters, read together, clearly contemplate independent action on the part of the Board of Health from its functions in concert with the Cabinet for Health and Family Services.

Examples include: KRS 212.210 allows the Cabinet or the local board of health to investigate issues with (1) drinking water in school districts, (2) safety problems with school construction, or (3) eradication of rats or other unsanitary nuisances (emphasis added). Pursuant to KRS 212.590, a county Board of Health has power to condemn property independent of any Cabinet action. The statute does not mandate that the local health board must wait for directives from the Cabinet, or the city or county governments.

Furthermore, local health boards are formed by adoption of the Fiscal Court, or by a petition of voters of that county, not by the Cabinet. While they are closely aligned with the Cabinet, Kentucky law specifically states that local health departments are governed by the local board of health. KRS 212.140.

If these statutes were to be interpreted as the Bullitt Circuit Court suggests, there would be no need for Chapter 212, since under the Bullitt Circuit Court's interpretation, a local board of health may not enact regulations short of a specific grant of authority from the Cabinet for Health and Family Services, or from a local legislative body. The Kentucky General Assembly, in creating Title XVIII, clearly intended to give health department boards broad authority to regulate matters regarding public health, and this delegation is well within the standard set under the Kentucky Constitution.

The Bullitt Circuit Court focused particularly on KRS 212.230(1)(c) in rendering its opinion. Without benefit of cited authority, the Bullitt Circuit Court ruled that the phrase "necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health" directly modifies the phrase "administrative regulations of the Cabinet for Health and Family Services." Based on this interpretation, the Court found that a local health department may only adopt "subordinate rules" that (1) do not conflict with administrative regulations adopted by the Cabinet; and (2) are authorized by a specific grant of statutory authority.

But a careful reading of the statute reveals that this interpretation on its face cannot be correct. The "chapter" described by the statute clearly does not refer to the statute alone, but to the "chapter" in which the statute is contained. The larger "chapter" is, of course, KRS 212. Also included in this "chapter" is a specific statement that one function of a board of health is to "examine all nuisances, sources of filth and causes of sickness," KRS 212.210, and to "...do all other things reasonably necessary to protect and improve the health of the people." KRS 212.890. The precise "examination" language, in Chapter 211, is repeated with regard to State Health Programs, KRS 211.210. If it were the intent of the legislature to only allow local health department boards the authority to develop regulations in areas subject to management by the Cabinet for Health and Family Services, there would have been no need for Chapter 212, and there would certainly be no need to repeat the similar language conferring the broad grant of authority. The Cabinet shall "assist all local boards of health," KRS

211.025, which is a far cry from "controlling and directing" the local boards, which is not the charge of the Cabinet. *See also* 902 KAR 8:150, Section 3, Functions of a Board, "(1) A governing board shall: Assure that the services provided meet the needs of the local citizenry, to protect and promote public health" (emphasis added). And, as aforesaid, see KRS 212.245(11) in this regard. And if it were the intent of the legislature to allow local health department boards to act only following specific authority from a local rule-making body, such an intention is not written into the statue.

Lastly on the issue of statutory construction, the Bullitt County regulation is not in conflict with any administrative regulation of the Cabinet, nor was any argument presented that it was violative in this regard. Therefore, the action of the board was proper.

"Legislative intent" is further made clear in KRS 212.820. In addressing multi-county health districts, our legislature acknowledged a health board's need to "improve the delivery of health services to the people." The Bullitt County Board of Health has done just that.

The rules of statutory construction are clear: when the General Assembly enacts legislation, it is assumed that the legislature intended for the statute to be construed as a whole and for all of its parts to have meaning. *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87 (Ky. 2005). Furthermore, the Courts also presume that the General Assembly did not intend an absurd statute or an unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181 (Ky. 1992). Only if the statute is ambiguous, or otherwise frustrates a plain reading, are judges

allowed to resort to the canons or rules of construction. *Stephenson v. Woodward*, 182 S.W.3d 162 (Ky. 2005). If a plain reading of the statute yields a reasonable legislative intent, then that reading is decisive and must be given effect regardless of the canons and regardless of our estimate of the statute's wisdom. *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006). Consequently, if the statute or ordinance is not ambiguous and "yields a reasonable legislative intent, then that reading is decisive and must be given effect regardless of the canons [of statutory construction]...." *King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 645 (Ky. 2008), citing *Lewis v. Jackson Energy Cooperative Corp.*, 189 S.W.3d 87 (Ky. 2005).

Despite the fact that the broad grant of authority bestowed to health department boards is clear, and despite the fact that there are no legislative or appellate court decisions holding that a health board's rulemaking is subordinate, the Bullitt Circuit Court concluded that Regulation 10-01 is not authorized by statute since, in the Court's view, KRS 212.230(1)(c) provides local boards of health with only limited, subordinate rulemaking authority, and KRS 61.165(3) allows only counties, municipalities and special districts to regulate smoking in office buildings, workplaces, and facilities that are owned, operated by, or under the jurisdiction of that local government (emphasis added). This tortured reading defies what is the evident meaning of these two statutes. KRS 61.165 must be understood in the context of the broad authority of public health boards. This statute carves out an exception to the health board's broad rule-making authority, because elsewhere in Chapters 211 and 212, it is clear that health department

officers may go onto private property, into schools, into municipal buildings, and abate nuisances or other threats to public health. Health department officers may also enter property without prior permission of the Cabinet, may seek orders from circuit courts to abate nuisances, and issue subpoenas. Clearly KRS 61.165(3) is intended, and in practical application is, two-fold: as a "carve-out" exception for municipal, special districts and counties, and is an oblique acknowledgment that for all other places, the health department board does have the authority to limit the use of tobacco and tobacco products; or, as an alternate approach to regulating smoking -- it may be regulated by one (local government), or the other (local health board). Exclusivity in this regard does not rest solely with local governments, and this statute should not be interpreted to read as such. It should be noted that no exceptions (*i.e.*, "save for smoking regulations") are contained to limit the powers of boards of health anywhere in KRS Chapter 212, nor does that chapter show any deference to KRS 61.165(3).

KRS 61.165, even in its amended form, did not, and does not, preempt the Appellee's clean indoor air regulation. Appellee dissected this issue in its Appellant's Brief filed with the Kentucky Court of Appeals. Amici Curiae are confident that Appellee will fully and convincingly argue this point in Appellee's Brief.

It is not true that only "elected representatives" can enact smoking regulations, as erroneously determined and concluded by the Bullitt Circuit Court. The trial court seemed to build in some nebulous accounting at the ballot box for those who vote to enact such regulations, as if this precise issue mandates that

those who do so must be in a position to be voted upon by the public. This is simply not the case. A city or county may adopt a clean indoor air ordinance; but, where they have not done so, the local board of health may act to regulate public smoking activity. It may be the desire of Appellants that only local governments may consider such matters, so that local "politics" may carry the day. However, that is simply not the law, and thankfully so. Matters as serious as the second-hand smoke hazard should not be left solely to perhaps be decided by politicians doing a head count of "who is for it, and who is against it." Responsible local health officials may undertake a more sensible, reasonable approach to such a matter of public health.

Two final points on the perceived requirement that those voting on matters of regulating indoor smoking in places open to the public should be "accountable at the ballot box." First of all, there is elective representation on all county boards of health. Pursuant to KRS 212.020(1), the elected Judge/Executive of a county is always a member of the local board of health. Another statutory member is one appointed by the elected fiscal court members (and in Amici Curiae Woodford County's case, that member was at the time of adoption of its Clean Indoor Regulation, a duly elected magistrate, which is oft times the case).

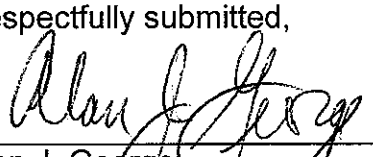
Secondly, if a fiscal court or city council enacts a clean indoor air ordinance, there is no subsequent immediate election that specifically focuses on that singular vote. Magistrates, commissioners, and city council members are like judges (and Justices) in this regard -- all elected officials simply appear on the ballot at the appointed time. A vote on an issue such as regulating smoking

does not appear on the ballot (emphasis added), nor are the local elected officials identified as having voted "for" or "against" a smoking regulation. An elected official is judged, privately, and without comment, by each voter, based on a body of work over his or her term of office. "Ballot box accountability," therefore, should not factor into this honorable court's decision. An elected local governmental body (fiscal court or city council) may enact clean indoor air ordinances. However, when that local elective body has failed to act in this regard, the county board of health, predominantly comprised of appointed individuals, may undertake to enact such a regulation.

CONCLUSION

For the foregoing reasons, and based upon the arguments set forth herein and to be set forth in the Brief for Appellee, Bullitt County Board of Health, this Court should affirm the Kentucky Court of Appeals' decision, and should order judgment in favor of the Bullitt County Board of Health in terms of the legality and constitutionally of it, and any Kentucky county board of health, enacting a Clean Indoor Air Regulation to regulate smoking inside certain public places and places of employment.

Respectfully submitted,



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