SUPREME COURT OF KENTUCKY
2013-SC-000023-D

BULLITT FISCAL COURT,
BULLITT COUNTY, KENTUCKY
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

APPELLANTS

V.

BRIEF FOR APPELLANTS

BULLITT COUNTY BOARD OF HEALTH

APPELLEE

APPEAL FROM BULLITT CIRCUIT COURT
CIVIL ACTION NO. 11-CI-00348
HON. RODNEY BURRESS, BULLITT CIRCUIT JUDGE, DIVISION ONE
AND ON DISCRETIONARY REVIEW FROM
THE KENTUCKY COURT OF APPEALS
2011-CA-001798

Hon. Monica Meredith Robinson
Hon. John E. Spainhour
Hon. Tammy Baker
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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned hereby certifies that copies of this Brief were served by first-class mail, postage prepaid, on this 12th day of December, 2013 to: Hon. Rodney Burress, Bullitt Circuit Judge, Division One, P.O. Box 97, Shepherdsville, KY 40165, Trial Judge; Hon. Margaret A. Miller, Bingham Greenebaum Doll, LLP, 200 West Vine Street, Suite 1100, Lexington, KY 40507, Attorney for Respondent; and to Hon. Jack Conway, Kentucky Attorney General, State Capitol, 700 Capitol Avenue, Suite 34, Frankfort, KY, 40601.

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Introduction

This is a review of a Declaratory Judgment by the Bullitt Circuit Court enjoining the enforcement of a county-wide smoking ban adopted by the Bullitt County Board of Health and contested by Motion of Bullitt County and all of its cities. The Kentucky Court of Appeals, in a divided opinion, reversed the Bullitt Circuit Court and remanded, and this Court granted discretionary review.

Statement Concerning Oral Argument

Appellant believes oral argument would be helpful to the Court. This case is of initial impression on the authority of a county Board of Health to promulgate a county-wide smoking ban and require the county and cities to police it. Such action usurps the express authority of the county and municipalities to legislate in this field, previously recognized in Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urbant County Gov't, 131 S.W.3d 745 (Ky. 2004), and recently expressed by the Kentucky General Assembly in its revisions to KRS 61.167.

Statement of Points and Authorities

Statement of the Case

Appellants, Bullitt Fiscal Court, Bullitt County, Kentucky, and each city (Mt. Washington, Shepherdsville, Hillview, Lebanon Junction, Pioneer Village, Hebron Estates, Hunters Hollow, and Fox Chase) located within the boundaries of Bullitt County, Kentucky, filed a Motion for Declaration of Rights in the Bullitt Circuit Court against the Bullitt County Board of Health (hereinafter "the Board.") on March 18, 2011. Trial Record (T.R.) p. 1. The action that precipitated that filing was the enactment by the Board of Regulation 10-01, a county-wide smoking ban (Appendix D). While the smoking ban is styled as a "Regulation", Appellants took the position that what the Board had made substantive law with no enabling legislation having been duly passed by a legislative body. Thereby, the Board usurps the authority of Appellants. T.R. p. 1-9. Appellants moved the court to hold that Regulation 10-01 was void and unenforceable and to permanently enjoin the Board from enforcing said regulation. T.R. p. 13-17.

Regulation No. 10-01 recites a number of studies relating to the risk of secondhand smoke, although there is no reference to any study detailing specific risks to the citizens of Bullitt County. The Board finds the regulation is:

> "(1) to protect the public health and welfare by prohibiting smoking in public places and places of employment, and
> (2) to guarantee the right of non-smokers to breath smoke-free air in such facilities, and to recognize that the need to breathe smoke-free air shall have priority over the desire to smoke."

The regulation then prohibits smoking in all enclosed areas of places of employment and private clubs, outdoor public places, 90% of all motel rooms, and other

outdoor places of employment (with some exception). Owners or operators in such places are required to post "no smoking" signs and remove ashtrays. All persons are prohibited from discharging, refusing to hire, or retaliating against any person who exercises a non-smoking right or reports a violation. Enforcement is by citation issued by the staff of the Board. Penalties for violation include criminal violation and fine, civil license revocation, and injunctive relief. Actions are authorized both in the District Courts and the Circuit Court. Local law enforcement is to be summoned by any owner, operator, or employee observing a recalcitrant violator.

Appellants argue:

1. The Board is without authority to enact Regulation 10-01;

2. If KRS 212.230(1)(c) is deemed to authorize such action, then KRS 212.230(1)(c) is an unconstitutional delegation to an administrative body in contravention of other pertinent law including the Doctrine of Separation of Powers[1]; and

3. Entry into the field of smoke and tobacco regulation by the Commonwealth has preempted the field, except for the specific entities identified by the General Assembly. These exceptions do not include the Board and are limited to legislative action.

The trial court made very clear that the issue in this case was whether the Board has authority to enact Regulation 10-01. T.R. p. 184. One issue specifically *not* under

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[1] A copy of this Brief for Appellants is served on Hon. Jack Cowan, Kentucky Attorney General, as the constitutionality of KRS 212.230(1)(c) may be at issue herein.

consideration was whether Regulation 10-01 was enacted with the intent of benefitting public health. T.R. p. 187. The issue was strictly one of law.

Both parties filed briefs and oral argument was heard on August 25, 2011. The trial court entered Judgment for Appellants. The trial court held the Board was without authority to promulgate Regulation 10-01 because there was no enabling legislation in place and the Board sought to pass a paramount rule rather than implement existing and validly enacted legislation. The trial court noted that the Board sought to dictate to Appellants what actions their police agencies and clerks must undertake and further sought to force Appellants to bear the costs of enforcement of Regulation 10-01. T.R. pp. 186-198 (Appendix B). The Board appealed.

The Kentucky Court of Appeals, in a divided opinion, reversed the Judgment of the Bullitt Circuit Court and remanded the matter of the Bullitt Circuit Court "for proceedings consistent with this opinion". Bullitt County Board of Health v. Bullitt Fiscal Court, et al, No. 2011-CA-001798-MR, rendered December 7, 2012 (Appendix A).

These Appellants moved for Discretionary Review and this Court granted such motion on October 16, 2013(Appendix C).

Argument

I. Standard of Review

Questions of law are reviewed *de novo*. This Court has stated,

> "[A] trial court's interpretation of the law is reviewed de novo, meaning it is entitled to no deference by the appellate court, but that standard of review does not mean that the appellate court is free to then address any and all legal issues that might affect the case. Rather, the court is bound to address only the question of law presented before a trial court." Fischer v. Fischer, 348 S.W.3d 582 (Ky. 2011).

II. Adoption and implementation of a county-wide smoking ban by the Bullitt County Board of Health usurps local legislative authority by an administrative body. Such action is not authorized by KRS 212.230(1)(c).

The Bullitt County Board of Health is an administrative body established pursuant to KRS Chapter 212. As such, the Board has the authority to pass administrative regulations as stated in KRS 212.230:

> "County, city-county, and district boards of health shall:
> (c) 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...." KRS 212.230(1)(c). (emphasis added)

In proposing the passage of Regulation 10-01, "A Regulation Related to the Protection of the Public Health and Welfare by Regulating Smoking in Public Places and Places of Employment," (hereinafter "Regulation 10-01", Appendix D), the Board seizes the legislative power of Bullitt Fiscal Court and the City Councils of all of the cities located in Bullitt County. The county (pursuant to KRS 67.083) and cities (pursuant to

KRS 82.082) hold the express power to enact ordinances. These legislatures hold broad power to do whatever is necessary for the health, safety and welfare of their residents. Barber v. Commissioner of Revenue, 674 S.W. 2d 18 (Ky. App. 1984). In enacting KRS 212.230, the legislature could not have meant to abrogate the legislative authority of local legislative bodies and pass it off to an administrative board, made up of appointed members, that is in no way accountable to the people.

Only legislative bodies may enact substantive law. Com. Cabinet for Health and Family Services v. Chauvin, 316 S.W.3d 279 (Ky. 2010); Ky. Const. §27, §28. By enacting a smoking ban, the Board has assumed legislative power for itself. Such power rightfully belongs with the legislative bodies of Bullitt County. This Court has stated, in the specific context of smoking bans:

> "Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed." Lexington-Fayette Urban County Bd. of Health v. Bd. of Trustees of the Univ. of Ky., 879 S.W.2d 485 (Ky. 1994) at p.486.

Justice Wintersheimer further stated:

> "This case is not about whether the decision of a local government to enact smoking restrictions is a sound policy matter. Such policy questions are completely within the province of the local legislative body and we do not find it necessary to review that decision in this matter. Any dissatisfaction can be raised at the ballot box." Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745 (Ky. 2004) at p. 749.

It is the right of the legislatures to enact substantive law. Any substantive law to the contrary must be strictly construed so as to not divest the state, or a subdivision thereof, of its prerogatives, rights, and remedies. If it was the intent of the legislature to divest Bullitt County (or its municipalities) of a right to legislate, this object has not been clearly expressed in the enabling statutory authority. Neither Bullitt Fiscal Court nor any City within Bullitt County has expressed an intent to divest itself of the right to legislate in this area.

Sections 27 and 28 of the Kentucky Constitution forbid the delegation of legislative power to administrative boards or agencies which are part of the executive branch of state government. Section 27 explains the separation of powers and Section 28 states,

> "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ky. Const. §28.

An administrative body may not perform the functions of a legislative body unless expressly directed or permitted.

> "It is well established that the legislature may delegate power to the executive branch via an administrative agency. The agency is then given some discretion in promulgating regulations to implement the general policy set forth by the legislature." *Internal citations omitted.* Vanhoose v. Com., 995 S.W.2d 389 (Ky. App. 1999).

In Vanhoose, the administrative agency passed regulations to implement the general policy set forth by the legislature. This Board crafts wholly new law. The Board has argued that KRS §212.230(1)(c) has given it authority to pass Regulation 10-01. However, the

Board may only adopt regulations that implement and enforce substantive law passed by legislative bodies.

> "Without doubt, the Legislature may authorize a board or administrative officer, such as appellee, in charge of some governmental affairs, to make police regulations, but it cannot abdicate its own police power on any subject and confer such power on an officer or a board to his or its uncontrolled discretion."
> Henry v. Parrish, 307 Ky. 559, at p. 564, 211 S.W.2d 418 (Ky. 1948), citing Goodpaster, Director of Insurance, v. Southern Ins. Agency, Inc., 293 Ky. 420, 169 S.W.2d 1 (Ky. 1943).

In Henry, the issue was whether the Jefferson County Board of Health had the authority to require payment of a permit fee by every local food establishment within Jefferson County. Id. at 560. The health board took the position that it was specifically granted power to promulgate rules and regulations regarding the public health, that such authorized the exercise of police power, and that the exaction of the fee was a necessary incident to the exercise of that power. Id. The Court held,

> "It is fundamental that the right to fix these fees is an incident to the exercise of a police power. Such power is sovereign and legislative. It is an inherent and plenary authority vested in the Commonwealth, given expression by legislative enactment. It is the tap root of government, out of which grow internal regulations necessary to preserve the public order, health, safety, and morals."
> Id. at 563.

The Henry Court went on to state,

> "It is true that a state legislature may authorize boards and other agencies to exercise an administrative discretion in the application of laws enacted by it... Therefore when we say that the Legislature may not delegate its powers, we mean that it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer discretion in the administration of the law itself. An administrative body may, of course,

> properly promulgate subordinate rules. But in this case the action of the Board constituted an exercise of legislative power in enacting the paramount rule. The Board actually pioneered in creating a liability not sanctioned by the lawmaking authority of the state, city or county. It invaded a new field of compulsory contribution where the ground had not been broken by a legislative body. It had no general authority of any kind to impose on any person or institution the obligation of financing the cost of its inspection services. In the absence of such authority the Board's discretion would be without limit, except as to reasonableness. It is, therefore, evident that the broad power to promulgate the rule here involved, subject to no legislative standard or guide, could not be delegated to the Board under fundamental constitutional limitations."
> Id. at 564-565.

As undertaken by the Jefferson County Board of Health in Henry, the Bullitt Board has proposed a regulation that does not assist in administration of a duly passed law, but ultimately is the paramount rule itself. Such action has not been expressly permitted by the legislature. The Henry Court in citing 42 American Jurisprudence, Public Administrative Law, Section 99, stated,

> "Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. The power to make regulations is not the power to legislate in the true sense, and under the guise of regulation legislation may not be enacted. The statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder. A rule which is broader than the statute empowering the making of rules cannot be sustained. Administrative authorities must strictly adhere to the standards, policies, and limitations provided in the statutes vesting power in them. Regulations are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined."
> Id. at 566.

Regulation 10-01 does not satisfy the requirements of KRS 212.130(1)(c) because KRS 212.130(1)(c) does not authorize the Board to pass legislation, which is what the Board

has undertaken to accomplish. Whether Regulation 10-01 is meant to protect the health of the people was not at issue at the trial level, nor currently at the appellate level. Appellants take no position on whether Regulation 10-01 is in the interests of public health.

The trial court agreed with Appellants and stated,

> "However, the authority of the Board of Health is strictly limited to the grant of authority which is conveyed by the Kentucky State Legislature. The power of an administrative agency to create administrative regulations is a function that is, by its very nature, limited. In resolving any limitations with respect to the function of an administrative agency, any doubt concerning the existence of the power is to be resolved against the agency. Courtney v. Island Creek Coal Company, 474 F. 2d 468 (1973). Absent a clearly mandated grant of power and authority this court must resolve any doubt concerning the agency's power and authority against the agency." T.R. p. 191.

This Court should affirm the ruling of the Bullitt Circuit Court.

III. A plain reading of KRS 212.230(1)(c) does not support the contention of the Board of Health that it has authority pursuant to that statute to pass a county-wide smoking ban.

The Bullitt County Board of Health has exceeded its statutorily granted authority in enacting Regulation 10-01 and a plain reading of KRS 212.230 does not aid Appellee's argument. KRS 212.230 specifically states, in pertinent part, emphasis added:

> **"212.230 Powers and duties of county, city-county, and district health boards.**
>
> (1) County, city-county, and district boards of health shall:
> (c) 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;

...and...

(h) ***Perform all other functions necessary to carry out the provisions of law and the regulations adopted pursuant thereto***, relating to local boards of health; ..."

The legislature twice chose to define the Board's acts as "administrative" in one sentence and expressly limits the Board's actions to those that "carry out the provisions of law and the regulations adopted pursuant thereto." In this case, there has been no law adopted by any legislative body in Bullitt County relating to a smoking ban. Further, the Kentucky Administrative Regulations promulgated by the legislature to the Cabinet for Health, Family and Children, do not mention a smoking ban law.

Appellee contends that a plain reading of KRS 212.230(1)(c) authorizes the Board to enact a county-wide smoking ban and claims that if no one else acts, it can act, regardless of prior legislative delegation of authority.

The Board may adopt *regulations* not in conflict with any other law relating to public health and contends that to require a legislative body to pass a paramount law before a Board of Health may promulgate a regulation is to read language into KRS 212.230 that is not present. This approach ignores the well established policy that the only constitutional method by which an administrative agency may promulgate regulations is if those regulations implement or administer the paramount law passed by a legislative body. Appellee's reading of KRS 212.230 is unreasonable and unconstitutional when measured against Ky. Const. 27 and 28, as well as the case law.

Appellee's contention that a board of health may pass "any other law relating to public health" could support the promulgation of any number of substantive laws in the guise of regulation of public health.

In support of its position that a plain reading of KRS 212.230 authorizes the Board to enact a smoking ban, Appellee and a majority of the Court of Appeals cite Com. v. Do, Inc., 674 S.W.2d 519 (Ky. 1984). Do is distinguishable. The issue in Do surrounded sanitary code violations of lead-based paint regulations. Do argued that the state had preempted the field of lead-poisoning prevention.

The Board of Health has authority to regulate in the field of lead poisoning. KRS 211.901(4) expressly authorizes the state cabinet to provide financial and technical assistance to establish and maintain local programs in regard to lead poisoning prevention. Id. at 521. There is no similar legislative grant of authority in regard to smoking. A statute must be read in context with other pertinent law.

> "As we have previously indicated, our goal in construing a statute is to give effect to the intent of the General Assembly. To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning. The statute must be read as a whole and in context with other parts of the law. Where a statute is unambiguous, we need not consider extrinsic evidence of legislative intent and public policy. We presume, of course, that the General Assembly did not intend an absurd or manifestly unjust result."
> Richardson v. Louisville/Jefferson County Metro Govt., 260 S.W.3d 777 (Ky. 2008).

It would be an unconstitutional delegation of authority for the legislature to confer upon an administrative agency the right to promulgate a regulation that outlaws an otherwise

completely legal activity with no guiding law being passed by any legislative body. Such a reading is not harmonious with other pertinent law and would cause an absurd or manifestly unjust result.

The Board of Health possesses no inherent authority and cannot regulate in the absence of express legislative grant. Brown v. Jefferson County Police Merit Bd., 751 S.W.2d 23 (Ky. 1988), Lovern v. Brown, 390 S.W.2d 448 (Ky. 1965). The majority and dissent in the Kentucky Court of Appeals agree that reasonable doubt about the proper scope of authority of an administrative agency is resolved against the agency to limit its power. Board of Education v. Scott, 189 Ky. 225, 224 S.W. 680 (1920). Reasonable doubt exists and compels a finding that the Board exceeds its authority to adopt demonstrative regulations to "protect the health of the people" under KRS §212.230(1)(c). There is no showing about public health conditions in Bullitt County. There is no limit on the power of the Bullitt County Board of Health if it determines something needs to be done to "protect the health of the people" as its only authority to act. As Judge Taylor notes in his dissent in the Court of Appeals:

> "Finally, absent legislative mandates, if the courts permit an overly broad interpretation of KRS 212.230(1)(c), there would be no limit on the regulatory authority of local health boards under the guise of public health. For example, under the majority's interpretation of the statute, there is nothing to prevent the Board of Health from regulating the sale of soft drinks over 16 ounces in size in convenience stores or limiting or regulating the number of cheeseburgers sold by fast food restaurants, which most would agree are contributing to the obesity of our children and adults, a legitimate public health concern. There would also be no restrictions on a health board to enact county-wide gun control rules or

> regulations relating to the sale or consumption of alcoholic beverages 'to protect the people.' " Appendix A, pp. 15-16.

IV. To the extent KRS 212.230(1)(c) is deemed to empower the Bullitt County Health Department to adopt a proposed smoking ban regulation, KRS 212.230(1)(c) is unconstitutional.

The trial court held that KRS 212.230 did not confer upon a Board of Health the authority to pass a county-wide smoking ban; therefore, the question of whether KRS 212.230 is constitutional was not addressed. Appellee argues that KRS 212.230(1)(c) does authorize the Board to pass a smoking ban and that such delegation of authority is constitutional. A majority of the Kentucky Court of Appeals agree. Appellee cites two cases in support of its contention. The first, Southeastern Displays, Inc. v. Ward, 414 S.W.2d 573 (Ky. 1967), is distinguishable. At issue were regulations promulgated by the Department of Highways. Id. It was argued that the delegation to the Department was a violation of Ky. Const. §27 and §28 and was an unconstitutional delegation of authority. Id. at 575. The Court held as follows,

> "A reading of the regulation indicates that it is in furtherance of the purpose of the legislation which specifically authorizes the adoption of such regulations. In the light of Butler v. United Cerebral Palsy of Northern Ky., Inc., Ky., 352 S.W.2d 203, such regulation is not an unconstitutional delegation of legislative power. Nor is the regulation vague and abstract. It contains various definitions and is specific in its terms in so far as this case is involved. It provides that signs located in protected areas, such as industrial or commercial areas, may be constructed and maintained." Id.

The General Assembly specifically gave authority to the Department of Highways. KRS 177.860 specifically enumerates the types of advertising signs that the Department may

regulate. The regulation was to further the objectives set out in statute by the General Assembly. The General Assembly had enacted a paramount rule. The Department then enacted by regulation a set of standards implementing the paramount rule. Neither the General Assembly nor any legislative body within Bullitt County has specifically granted authority to the Board to regulate smoking.

The second case cited by Appellee is Butler v. United Cerebral Palsy of Northern Ky., Inc., 352 S.W.2d 203 (Ky. 1961). At issue was whether the legislature could delegate to the State Board of Education the authority to approve private learning institutions to receive public funds when lack of programs at public schools leads special needs children to attend private school. The Court held that such was an authorized delegation and weighed the practical needs of effective government against safeguards against abuse and injustice and cited the time and financial constraints of the General Assembly. The General Assembly, by statute, established that private schools providing instruction to special needs children could receive public assistance if the public schools within the same district as the private school were not offering like instruction. The statute allows the State Board of Education the technical aspect which is determination of which specific schools will qualify. Regulation followed a specifically stated statutory mandate.

If KRS 212.230 is deemed to allow the adoption of Regulation 10-01, the statute is overbroad, without legislative standard or guide, and thereforeshould not be delegated to the Board on the basis of fundamental constitutional limitations. Arbitrary regulation is

prohibited. Kentucky Retirement Systems v. Bowens, 281 S.W. 3d 776 (Ky. 2009).

> "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. §2

V. The field of tobacco and smoke regulation has been preempted by the Commonwealth of Kentucky and its subdivisions.

KRS 61.167 prohibits smoking in the public areas of the Capitol and Capitol Annex in Frankfort, Kentucky. KRS 61.165 allows for special districts to adopt a policy for smoking in office buildings or workplaces in the special district. Thus, the Board may certainly adopt a policy in regard to smoking in office buildings or workplaces of the Board. This statute does not grant special districts with the authority to enforce a smoking ban anywhere other than office buildings or workplaces of the special district.

KRS 61.165 also allows counties and municipalities to adopt policies in regard to smoking in office buildings or workplaces of the county and city respectively. The counties and cities of Bullitt County, therefore, have the authority to adopt a smoking policy in regard to office buildings or workplaces of the county and cities respectively. Appellees have conceded that the Board is without authority to regulate smoking in buildings owned by either the county or any city in Bullitt County. Appellants maintain that state law has preempted the Board from passing a smoking ban anywhere in Bullitt County.

The Kentucky Supreme Court has held that an ordinance passed by Lexington-Fayette Urban County Government regulating the smoking of tobacco within the government's

jurisdictional limits was not preempted by state regulation. Lexington Fayette County Food and Beverage Assoc. v. Lexington-Fayette Urban County Government, 131 S.W.3d 745 (Ky. 2004) (hereinafter "LFUCG"). In LFUCG, the Court evaluated whether state laws regulating the sale, distribution, or use of tobacco products would preempt a local smoking ban. Id. At that time, the Court held that the state had not preempted the field. Id. This decision was rendered on April 22, 2004.

The Board asserts that because KRS 61.165 was in effect at the time LFUCG was decided, the statute does not preempt the Board from passing a smoking ban. KRS 61.165, as was in effect at the time LFUCG was decided, read as follows:

> KRS 61.165
>
> A policy for smoking in governmental office buildings or workplaces may be adopted by state, county, municipal, special district, or urban-county governments.
>
> (1) Any policy relating to smoking in state office buildings or workplaces shall:
> (a) Be by executive order of the Governor or action of the General Assembly;
> (b) Require the governmental authority to provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and
> (c) Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority.
> (4) Any policy relating to smoking in governmental office buildings or workplaces of counties, municipalities, special districts, or urban-county governments shall:
> (a) Be adopted by the legislative body of the government;
> (b) Be in writing;

(c) Require the government authority to provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and

(d) Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority.

(5) This section shall not apply to state universities, state-operated hospitals and residential facilities for the mentally ill and the mentally retarded, state-operated veterans' nursing homes and health facilities, and jails or detention facilities."

However, after the ruling in LFUCG, the General Assembly made changes to KRS 61.165. Appellants assert that these changes were in response to the outcome of LFUCG and that, as a result, the General Assembly expressly intended to preempt the field. The changes to KRS 61.165 are as follows, with changes in bold:

(1) **Except as otherwise specified for the Capitol and Capitol Annex in KRS 61.167,** a policy for smoking in governmental office buildings or workplaces **shall** be adopted by state government. **This policy shall apply to all state-owned or state-operated office buildings, workplaces, and facilities, including but not limited to state-operated hospitals and residential facilities for the intellectually disabled, state-operated veterans' nursing homes and health facilities, and any correctional facility owned by, operated by, or under the jurisdiction of the state.**

(2) **Except as otherwise specified for the Capitol and Capitol Annex in KRS 61.167,** any policy relating to smoking in state office buildings or workplaces shall be by executive order of the Governor or action of the General Assembly, and shall:

(a) 1. Require the governmental authority to provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and

2. Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority; **or**

(b) Prohibit indoor smoking.

(1) Except as otherwise specified for the Capitol and Capitol Annex in KRS 61.167, a policy for smoking in governmental office buildings or workplaces may be adopted by county, municipal, special district, urban-county, charter county, or consolidated local governments. Any policy adopted under this subsection may apply to any office buildings, workplaces, or facilities that are owned by, operated by, or under the jurisdiction of that government, including but not limited to jails and detention facilities. Any policy relating to smoking in governmental office buildings or workplaces of counties, municipalities, special districts, urban-county governments, charter county governments, or consolidated local governments shall be adopted in writing by the legislative body of the government and shall:

(a) 1. Require the governmental authority to provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and

2. Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority; **or**

(b) Prohibit indoor smoking.

(2) Each board of regents or trustees for each of the state postsecondary education institutions shall adopt a written policy relating to smoking in all buildings owned by, operated by, or under the jurisdiction of the state postsecondary education institutions that shall:

(a) 1. Provide accessible indoor smoking areas in any buildings where smoking is otherwise restricted; and

2. Favor allowing smoking in open public areas where ventilation and air exchange are adequate and there are no restrictions otherwise placed on the area by the state fire marshal or other similar authority; or

(b) **Prohibit indoor smoking.**

KRS 61.165 was not in effect in its current form at the time LFUCG was decided. The present version of KRS 61.165 is more specific and detailed now than in 2004 when LFUCG was decided. The Court in LFUCG held that the smoking ban passed by Lexington-Fayette Urban County Government was not preempted by state government. One reason for this holding was that at that time there were no statutes or regulations expressly related to indoor smoking. KRS 61.165, extensively amended after said holding, is expressly related to indoor smoking. Regulation 10-01 purported to strip Appellants, all local government entities, of the rights conferred upon them by KRS 61.165. Appellants have now conceded this point.

The action of the General Assembly in making the changes enumerated supra to KRS 61.165 after LFUCG was decided has preempted the field of tobacco and smoke regulation thereby preventing any entities, other than local governments and special districts as specified in said statute, from regulating the field. The health department is not named or authorized. Only legislative bodies were authorized.

CONCLUSION

Regulation 10-01 infringes the legislative power reposed by law in the legislative bodies of Bullitt County and its cities. The Smoking Regulation issued by the Bullitt County

Board of Health usurps the rights and duties of the elected representatives of the people of the county. The Board exceeds the statutory authority granted to the board under KRS 212.230.

Arguendo, any construction of KRS 212.230 that would be deemed to devolve authority to adopt Regulation 10-01 on the Board would render KRS §212.230 unconstitutional. An administrative body may adopt regulations to implement and enforce duly passed legislation. An administrative body may not take it upon itself to pass legislation, even if the appropriate legislative bodies have not legislated in the particular area.

Arguendo, smoking regulation is preempted by the State of Kentucky and the legislatures of its respective political subdivisions.

For these reasons, and all those enumerated *supra*, the decision of the trial court should be upheld, and the Opinion of the Court of Appeals vacated.

Respectfully Submitted,

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Appendix

A. Bullitt County Board of Health vs. Bullitt County Fiscal Court, et al
Opinion Reversing and Remanding in Kentucky Court of Appeals
Rendered December 7, 2012, No. 2011-CA-001798-MR (17 pages)

B. Bullitt Fiscal Court, et al, vs. Bullitt County Board of Health
Order for Motion for Declaration of Rights adjudging Bullitt County Board of Health Regulation 10-01 void and unlawful and enjoining its implementation or enforcement
Entered September 15, 2011, Bullitt Circuit Court No. 2011-CI-00348 (13 pages)

C. Bullitt Fiscal Court, et al, vs. Bullitt County Board of Health
Order Granting Discretionary Review
Entered October 16, 2013, Supreme Court of Kentucky No. 2013-SC-000023-D (1 page)

D. Bullitt County Board of Health Regulation 10-01
Passed and approved March 22, 2011 (11 pages)