

---

## Coates' Canons Blog: Local Smoking Regulation: Should You Adopt a Health Rule or an Ordinance?

By Aimee Wall

Article: <https://canons.sog.unc.edu/local-smoking-regulation-should-you-adopt-a-health-rule-or-an-ordinance/>

This entry was posted on December 01, 2009 and is filed under Public Health, Smoking Laws

---

The new smoking law, S.L. 2009-27, not only prohibits smoking in most bars and restaurants across the state but it also significantly expands local governments' authority to regulate smoking. Beginning January 2, 2010, local governments may

adopt and enforce ordinances, board of health rules, and policies restricting or prohibiting smoking that are more restrictive than State law and that apply in local government buildings, on local government grounds, in local vehicles, or in public places. (S.L. 2009-27, amending G.S. 130A-498(a))

Several local governments are already in the process of developing local laws to take advantage of this new authority. For example, I have heard from jurisdictions considering prohibitions on smoking in enclosed public places, such as malls and bowling alleys, and also in outdoor areas owned by the local government, such as parks. Under this new law, the two main options for adopting enforceable, local laws are ordinances or board of health rules. Which of these two types of laws makes more sense? The answer may vary by jurisdiction. In choosing an option, consider these important differences between the two tools.

Most North Carolina counties are served by single-county health departments. Some are served by multi-county district departments and a few are served by other variations on the theme (see [Article 41 of County and Municipal Government in North Carolina](#) for a full discussion of the various types of health departments). In each case, elected officials are required to appoint a board that, by statute, acts as the "the policy-making, rule-making and adjudicatory body" for the department." (see, e.g., [G.S. 130A-35](#)). The rulemaking directive states simply:

A local board of health shall have the responsibility to protect and promote the public health. The board shall have the authority to adopt rules necessary for that purpose. ([G.S. 130A-39](#))

Over the years, some boards of health have been particularly active in the rulemaking process while others have not.

Why might a jurisdiction prefer a board of health rule to a local ordinance? Perhaps most significantly, a board of health rule applies "to all municipalities within the local board's jurisdiction." ([G.S. 130A-39\(c\)](#)). Thus, a rule allows for uniformity across an entire county or district, which may not be possible if multiple elected boards act (or choose not to act) independently. A board of health may also be the preferred lawmaking body if the issue of smoking is highly political within the jurisdiction. As an appointed body that is charged with protecting the public's health, it may be more politically insulated than a body comprised of elected officials.

On the other hand, why might a jurisdiction prefer a local ordinance? Relying upon the board of health to adopt a local smoking law does present some interesting challenges. First, the new law imposes an unusual requirement on board of health rules related to smoking: the rules must be "approved by an ordinance adopted by the Board of County Commissioners of the county to which the rule applies." ([S.L. 2009-27](#), amending [G.S. 130A-498\(a\)](#)). No other board of health rules are required to have such approval. Not only does this new requirement create additional administrative hurdle for the jurisdiction to overcome, it also directly propels the work of an appointed body (the board of health) into the political arena.

The second challenge arises from a 1996 Court of Appeals decision, *Roanoke Rapids v. Peedin*, 124 N.C.App. 578, 478 S.E.2d 528 (1996). In that case, the court invalidated local rules prohibiting smoking in many restaurants and bars. The court explained that, as an administrative body, the board of health had overstepped its authority when it created exceptions for certain types of regulated establishments based upon size and other characteristics unrelated to the

---

protection of health. It concluded that only legislative bodies are empowered to draw such distinctions. While this decision stems from local board of health rules that were adopted based upon authority granted by the “old” smoking law (Chapter 143, [Article 64](#)), it is still important precedent to consider as boards move forward with local smoking rules under the “new” smoking law. The court’s premise – that the rulemaking authority of administrative bodies should be narrowly construed to reflect legislative direction and policy-making – establishes a baseline consideration that applies to all board of health rules. In the context of new local smoking laws, this likely means that an ordinance is a better choice than a BOH rule if the jurisdiction wishes to regulate smoking in a manner that makes distinctions unrelated to health concerns. For example, suppose a jurisdiction is interested in establishing a prohibition on smoking in public places but with an exemption for bowling alleys. In this example, it may be more appropriate for the jurisdiction to rely upon an ordinance rather than a board of health rule.

This discussion touched on only a few of the considerations that will come up when evaluating whether to pursue a rule vs. an ordinance. Local governments certainly have other factors that they take into account. What are they? How much weight do they carry in your jurisdiction?

For more detailed information about the old smoking law, the new smoking law and everything in between, please visit SOG’s public health law website. In addition to publications and FAQs about the law, the website provides links to archived versions of three recent smoking webinars co-sponsored by the School of Government and the Division of Public Health within the N.C. Department of Health and Human Services.

## Links

- [www.ncleg.net/Sessions/2009/Bills/House/PDF/H2v10.pdf](http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H2v10.pdf)
- [www.sog.unc.edu/pubs/cmgs/cmgs41.pdf](http://www.sog.unc.edu/pubs/cmgs/cmgs41.pdf)
- [www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter\\_130A/GS\\_130A-35.pdf](http://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_130A/GS_130A-35.pdf)
- [www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter\\_130A/GS\\_130A-39.pdf](http://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_130A/GS_130A-39.pdf)
- [www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter\\_143/Article\\_64.pdf](http://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_143/Article_64.pdf)
- [www.ncphlaw.unc.edu/](http://www.ncphlaw.unc.edu/)