Coates' Canons Blog: Regulating Electronic Cigarettes in North Carolina, Part 2: Local Regulation

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This is the second of two posts on the regulation of electronic cigarettes and other vapor products in North Carolina. **Part 1** addressed federal and state regulation. Now it's time to talk about local regulation.

This post focuses specifically on the authority of city or county governing boards and local boards of health. Another local entity with a strong interest in tobacco use policies is the local school board. I'm not going to address schools in this post, but more information about e-cigarette policies for K-12 schools is available on-line: see this **February 2014 memo** from State Superintendent June Atkinson to North Carolina's local superintendents.

This post also focuses specifically on local regulation of the *use* of vapor products. As I wrote in part 1, local governments may not regulate the sale, distribution, display, or promotion of e-cigarettes or other vapor products. Such regulations are expressly preempted by G.S. 14-313, the 2013 law that banned the sale of vapor products to minors. However, that law did not address local regulation of *use*.

Sources and Scope of Local Authority

Do local governments have the authority to regulate the use of electronic cigarettes and other vapor products? I believe they do – indeed, **quite a few have exercised it** – but where that authority comes from requires some discussion.

It doesn't come from the state's smoking regulation laws. **G.S. 130A-498** expressly grants local governments the authority to regulate smoking in public places, with some limitations. But as I explained in part 1, smoking is defined as the use of the use or possession of a *lighted* tobacco product. E-cigarettes and other vapor products are not lighted; therefore, G.S. 130A-498 neither provides nor limits authority for local governments to regulate the use of vapor products.

However, both city and county governments have statutory authority to enact local ordinances to protect the health, safety, and welfare of their citizens. In addition, local boards of health have statutory authority to adopt local rules to protect and promote the public health within their jurisdictions. A number of local governments in North Carolina have exercised their authority under one of these statutes to regulate a variety of smokeless tobacco products, in some cases specifically including electronic cigarettes and other vapor products. The authority these statutes grant is broad but not unlimited, and there are important differences between city or county governing boards and boards of health so I will consider them separately, starting with the ordinance-making authority of local governing boards.

City or County Ordinances

Counties and cities have the authority to enact ordinances to "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of [their] citizens and the peace and dignity" of the county or city. **G.S. 153A-121** (counties); **160A-174** (cities). Such ordinances are exercises of the police power, a state power that the General Assembly has partially delegated to cities and counties via these statutes.

Earlier this summer, the North Carolina Supreme Court addressed municipal authority under G.S. 160A-174 in ***King v. Town of Chapel Hill***. The court considered the validity of two local ordinances: one regulating the practices of vehicle-towing businesses, and one banning the use of mobile phones by drivers within the town limits. It upheld most of the former as a valid exercise of the town's police power, but struck down the latter after concluding it was preempted by the state's complete and integrated regulatory scheme regarding the use of mobile phones by drivers. My colleague Trey Allen has written two excellent posts about *King* – see **here** and **here**—which I strongly encourage anyone who advises a city or county on their ordinance-making authority to read. The King decision addressed two issues that are worth

considering in the context of local regulation of e-cigarettes: (1) the scope of local ordinance-making authority under the police power statutes, and (2) the circumstances under which a local ordinance might be preempted by state law.

Scope of Authority

The *King* court embraced a broad view of local governments' authority to enact ordinances to protect health, safety, and welfare. First, it held that the authority delegated to cities by G.S. 160A-174 must be construed broadly, in accordance with a construction rule set out in **G.S. 160A-4** ("[T]he provisions of this Chapter … shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."). As Professor Allen **notes**, by implication, the statute that authorizes counties to adopt ordinances to protect health, safety, and welfare (G.S. 153A-121) must also be interpreted broadly. It is worded similarly and subject to an identical rule of construction (**G.S. 153A-4**). The court also described the police power as having a "reach [that] cannot be fully defined in clear and definite terms," and quoted other sources that describe it as an "elastic" power that may be "'extended or restricted to meeting changing conditions.'" King, slip op. at 9 (citations omitted). However, the police power is not unlimited—ordinances enacted pursuant to the statutes delegating police power to local governments must be rationally related to a substantial government purpose. *Id*. at 10 (citations omitted).

Second, the court concluded that the vehicle-towing practices of private businesses are a proper subject for police power regulation. It accepted the town's argument that such practices can be detrimental to the health and safety of the town's citizens because of the risk that drivers would be stranded without transportation, and that involuntary towing might provoke altercations between vehicle owners and towing personnel. As Professor Allen has noted, the court didn't require the town to show that such incidents had in fact occurred or caused harm to anyone—it appeared satisfied that these detrimental effects logically could occur. While it would not be precise to say the court was deferential to the town on this matter—the opinion reflects deliberation—I think it is fair to say the court did not set the bar too high for a local government to determine that a matter that is potentially harmful to health or safety is appropriate for local police power regulation.

What might these conclusions mean for local ordinances regulating e-cigarettes or other vapor products? The broad view of the police power embraced by the court in *King* appears quite supportive of local regulation of the use of vapor products. The court's acknowledgment of the need for flexibility to address new risks to public health or safety that may not have been contemplated by the legislature is certainly noteworthy, as vapor products are a good example of a new risk. The decision also provides support for the conclusion that regulation of vapor products is a proper subject for police power regulation. Although the scientific evidence about the safety and health effects of the products is still being developed, there is probably enough evidence to show the potential for detrimental effects, which is all the King court required. (For more information about the scientific evidence of health risks of vapor products, see this **letter** from the US Department of Health and Human Services to the NC Tobacco Prevention and Control Branch.)

Preemption

The *King* court also held that even if an ordinance is within the scope of a local government's authority under the enabling statutes, it may nevertheless be preempted if it regulates "'a field for which a state or federal statute shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.'" *King*, slip op. at 17, quoting G.S. 160A-174(b)(5). This type of preemption, which exists even in the absence of express preemption language, is called implied preemption. In determining whether implied preemption applies to a particular issue, a court must consider whether the General Assembly has expressed a clear intent to provide a complete and integrated regulatory scheme. It does this by examining what the relevant state law seeks to accomplish. If legislative intent is not readily apparent, it is appropriate to look at other, related statutes as well.

Applying this analysis in the *King* case, the court determined that the town's mobile phone ordinance was preempted. It first noted that "the regulation of highways and roads has generally been the prerogative of the State, not counties and cities," and pointed out that there are over 1100 pages of statutes regulating transportation and travel on the roads. *King*, slip op. at 18. It also noted that in some cases the legislature has specifically given authority over roadways to local governments, but has not done so with respect to mobile phone use by drivers. The court cited three specific statutes that prohibit various uses of mobile phones by drivers, including the prohibition on any use by drivers under age 18, and the prohibition on text messaging by drivers of all ages, and noted that one was specifically titled, "Unlawful use of a mobile phone." Considering all of this together, the *King* court concluded the statutes evidence the legislature's intent to provide a

complete and integrated regulatory scheme to the exclusion of local regulation.

While *King* is the most recent NC Supreme Court case on implied preemption of local ordinances, it is not the only one. In *Craig v. Chatham County*, 356 N.C. 40 (2002), the court concluded that local ordinances regulating swine farms were preempted by the state's Swine Farm Siting Act (G.S. Chapter 106, Article 67) and a set of state laws addressing animal waste management systems (G.S. 143-215.10A – .215.10M). It placed particular emphasis on a statement of purpose contained in the Swine Farm Siting Act, which the court believed demonstrated the legislature's overarching goal of supporting pork production while protecting the rights of nearby landowners, and its intent to legislate in a fashion that balanced those two concerns—a balance that could be disturbed if each county were allowed to create different rules.

So what does this mean for the local regulation of e-cigarettes and vapor products? Is there a complete and integrated regulatory state law scheme that precludes local regulation of e-cigarettes? I cannot say there is no room for argument here, but I think the best conclusion is that North Carolina does not presently have a complete and integrated regulatory scheme for vapor products. The handful of state statutes regulating vapor products do not begin to approach the statutory scheme for regulating motor vehicles that the *King* court described. As the court acknowledged, there is an entire body of state law regulating motor vehicles—over 1100 pages regulating "almost every aspect." In contrast, while there are three new statutory provisions regulating vapor products, they regulate disparate issues: sales to minors, possession and use in correctional facilities, and taxation. They probably lack the coherent relationship you would expect to see in a "comprehensive and integrated regulatory scheme," and they certainly aren't tied to any statements reflecting the kind of balance that the *Craig* court found compelling.

That said, the statute prohibiting sales of vapor products to minors (**G.S. 14-313**) does contain a statewide uniformity provision, and the beginning language of that section expresses an intent to establish a uniform system of regulation of tobacco products generally, not just vapor products. However, when read in its entirety the uniform system that is referenced is limited in purpose (to ensure eligibility for federal funds and grants) as well as in scope (to sale, distribution, display, or promotion of products). The statute has been on the books for decades with respect to other, non-vapor tobacco products and has never been construed to restrain local regulation of use of tobacco products. Indeed, when the General Assembly wanted to preempt local government regulation of smoking, it did so expressly (for more information about the history of NC laws expressly preempting local smoking regulation, see **Aimee Wall's 2009 health law bulletin**).

Board of Health Rules

Local boards of health have the authority to adopt rules that are necessary to protect and promote the public health. (**G.S. 130A-39**). A board of health rule is valid throughout the county or counties in the board's jurisdiction, including within any municipalities served by the board. G.S. 130A-498 expressly authorizes local boards of health to adopt rules regulating smoking in public places, but such rules apply only to lighted tobacco products. Therefore, when a local board of health regulates the use of other tobacco products, including vapor products, it is acting under its general rule-making authority. That authority is subject to a few limitations spelled out in the statute, but none of those limitations are specific to rules about the use of vapor products.

Additional limitations to the rule-making authority have been imposed by state courts. The North Carolina Supreme Court has held that a local board of health rule may be preempted by state law if the state has already provided a complete and integrated regulatory scheme in the area addressed by the local rule. *Craig v. Chatham County,* 356 N.C. 40 (2002). I have already discussed the issue of implied preemption in the section on local ordinances. A similar analysis applies to board of health rules, with a caveat: a board of health may still adopt a local rule that is more stringent than a state rule on the same subject, but only if it can provide a rationale for why higher local standards are needed to protect the public health.

In addition, the North Carolina Court of Appeals has enunciated a five-part test that a local board of health rule must satisfy to be valid. *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578 (1996).The rule must: (1) be related to the promotion or protection of health, (2) be reasonable in light of the health risk addressed, (3) not violate any law or constitutional provision, (4) not be discriminatory, and (5) not make distinctions based upon policy concerns traditionally reserved for legislative bodies. To satisfy the *Peedin* test, the board likely needs to be able to support the conclusions that (1) restriction of the use of vapor products promotes or protects public health, and (2) the particular restrictions imposed by the rule are reasonable in light of the risk the products pose. It would be wise for a board of health to take the scientific evidence that is available about vapor products into account in reaching its conclusions.

Conclusion

Local regulation of e-cigarettes and other vapor products appears to be supported by current state law. The state smoke-free public places law is not the authority for such regulation, because its reach is limited to lighted tobacco products. Instead, the authority is found in state laws authorizing local ordinances or board of health rules.

State statutes authorize both city and county governments to enact local ordinances to protect the health, safety, and welfare of their citizens. Recent case law clarifies that the authority of these statutes must be interpreted broadly, and provides support for local regulation of matters that logically have the potential to be detrimental to health and safety, even if no actual harm has been demonstrated. Local boards of health also have statutory authority to adopt local rules within their jurisdictions, so long as the rules are related to the protection and promotion of the public health. Both local ordinances and local board of health rules are subject to preemption by state laws creating a complete and integrated regulatory scheme for an issue. While there are a few new state law provisions regulating vapor products in North Carolina, those provisions probably do not constitute the type of complete and integrated regulatory scheme that has led to preemption of local regulation in other cases.

Links

- canons.sog.unc.edu/?p=7787
- www.ncpublicschools.org/docs/superintendents/messages/2014/0219/memo-cigarettes.pdf
- www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/List%20of%20Local%20Regulations%20Adopted%20Including%20E-cigs%2008%2001%2014.pdf
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-498
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-121
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-174
- appellate.nccourts.org/opinions/?c=1&pdf=31737
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- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=14-313
- sogpubs.unc.edu/electronicversions/pdfs/hlb90.pdf
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-39