
Coates' Canons Blog: What is the Territorial Jurisdiction of a Board of Health Rule Regulating Smoking?

By Jill Moore

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UPDATE: I wrote a more detailed manuscript about this issue for the February 2013 county attorneys' winter conference. It is available [here](#). Later that same month, a NC Attorney General advisory letter addressed this issue and reached conclusions similar to mine. The AG letter is available [here](#).

In a North Carolina county—let's call it Dogwood county—a group of parents has approached the county board of health and asked it to “please do something” about smoking in public parks where children play. The group is especially concerned about a popular park with a large playground that is located within the town limits of the county's only incorporated municipality. We'll call the town Mayberry.

The Dogwood county board of health knows that a **2009 law** gave it the authority to adopt rules regulating smoking in outdoor areas owned, leased or occupied by local governments. The board also knows that when it exercises its public health rule-making authority, the rules it adopts ordinarily apply throughout the county, including within the town limits of Mayberry. But the county attorney who advises the board of health, Andrea Taylor, is concerned that a board of health rule regulating smoking might be different—that the rule might apply only in the unincorporated areas of the county. Why would Ms. Taylor think this? Is she right?

The question arises because of two provisions in **G.S. 130A-498**, the law that authorizes local regulation of smoking. Subsection (a) of the law authorizes local ordinances, board of health rules, or policies regulating smoking in certain places. However, a local board of health rule that regulates smoking must be “approved by an ordinance adopted by the Board of County Commissioners.” Subsection (e) of the same law then states: “A county ordinance adopted under this section is subject to the provisions of **G.S. 153A?122**”—the law that establishes the territorial jurisdiction for county ordinances. Under that law, county ordinances are effective only in the unincorporated areas of the county and do not apply within a municipality unless the municipality adopts a resolution consenting to be governed by the ordinance.

Thus we get to Ms. Taylor's question: Does the requirement that the board of commissioners approve the board of health rule by ordinance have the effect of limiting the jurisdiction of the health rule to the unincorporated areas of the county?

I think it does not, but this is debatable and I can see the path to a different conclusion. The argument that subsection (e) does in fact limit the reach of a board of health smoking rule to the unincorporated areas of the county seems straightforward: A board of health rule regulating smoking must be approved by a county ordinance and a county ordinance's territorial jurisdiction is limited to the unincorporated areas of the county. Therefore, the approval granted by the county ordinance applies only to the unincorporated areas and the rule cannot be enforced within municipalities because it lacks the approval required to be effective.

The problem I have with this argument is that it would seem to render a portion of the smoking law meaningless. If the effect of subsection (e) is indeed to limit the territorial jurisdiction of a board of health rule to the unincorporated areas of a county, then why does the law give boards of health authority to regulate smoking in the first place? Subsection (a) already authorizes cities and counties to adopt ordinances regulating smoking. I simply do not see the point of granting separate authority to a board of health to adopt smoking rules if all the affected counties and municipalities must also adopt ordinances in order for the rules to be effective.

I also think it is significant that the legislature required that a board of health smoking rule be *approved by* an ordinance of

the county commissioners, as opposed to *adopted* as an ordinance. A requirement for *approval* strikes me as a provision the legislature might reasonably include to ensure that there is oversight of the board of health's decision-making in this area by the body that appoints it, without compromising the board of health's authority to regulate throughout the jurisdiction—including within municipalities—under **G.S. 130A-39** (the law that gives boards of health their general rule-making authority).

If you accept this position, however, then haven't I essentially argued that subsection (e) of the statute is meaningless? I don't think so. My take on subsection (e) is that it applies to county ordinances *directly regulating* smoking in the county, not county ordinances approving a board of health rule regulating smoking. Of course, that would be the rule anyway under G.S. 153A-122 so it is curious that it would be repeated here. However, it could be a clarification of the scope of a board of county commissioners' authority to regulate smoking in local government buildings or on local government grounds—two terms that are defined broadly enough that it might appear the county commissioners could directly regulate smoking in city buildings and grounds absent this restriction. (The definitions are in **G.S. 130A-492**.)

What does all of this mean for the Dogwood county residents who would like to see smoking restricted in the parks, including the park that is in the Mayberry town limits? Certainly smoking could be regulated in parks throughout the county if both the board of county commissioners and the town's governing body adopted separate ordinances regulating smoking in the parks within their jurisdiction. I also think the same result could be achieved by a single rule adopted by the county board of health and approved by an ordinance of the board of county commissioners.

If you were Ms. Taylor, how would you advise the board of health?

Links

- www.sog.unc.edu/resources/legal-summaries/territorial-jurisdiction-local-board-health-rules-regulating-smoking-north-carolina-0
- www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Signed%20AG%20Advisory%20Opinion%20%20202013%20%28BOH%20smoking%20rules%29.pdf
- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2009-2010/SL2009-27.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-498
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-122
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=130A-39
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