STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30212
LANSING, MICHIGAN 48909

MIKE COX
ATTORNEY GENERAL

May 16, 2006

Honorable Leon Drolet
State Representative
The Capitol
Lansing, MI

Honorable Tom Casperson
State Representative
The Capitol
Lansing, MI

Honorable Joe Hune
State Representative
The Capitol
Lansing, MI

Honorable Judy Emmons
State Representative
The Capitol
Lansing, MI

Honorable John Stahl
State Representative
The Capitol
Lansing, MI

Honorable Bill Huizenga
State Representative
The Capitol
Lansing, MI

Honorable Scott Hummel
State Representative
The Capitol
Lansing, MI

Honorable William Van Regenmorter
State Representative
The Capitol
Lansing, MI

Honorable John Garfield
State Representative
The Capitol
Lansing, MI

Honorable Philip LaJoy
State Representative
The Capitol
Lansing, MI

Honorable Daniel Acciavatti
State Representative
The Capitol
Lansing, MI

Honorable Lorence Wenke
State Representative
The Capitol
Lansing, MI

Honorable Chris Ward
State Representative
The Capitol
Lansing, MI

Honorable Jack Hoogendyk
State Representative
The Capitol
Lansing, MI

Dear Representatives:

Attorney General Cox has asked me to respond to your letter in which you ask whether home rule cities and counties are authorized to adopt ordinances prohibiting smoking in public places. Specifically, your request concerns the legality of ordinances regulating smoking adopted by the City of Marquette and the Counties of Chippewa, Genesee, Ingham, and Washtenaw. You ask whether each local unit of government has the authority to establish a restriction on smoking. Due to the subject matter of your request, I asked staff in the Tobacco and Special Litigation Division and the Opinions and Municipal Affairs Division to review your letter. The following represents their findings.

The questions presented in your request follow up on an informational letter dated September 14, 2004, from then Chief Deputy Attorney General Carol L. Isaacs to Representative Scott Shackleton analyzing in general terms whether a county may impose a ban on smoking in private and public places within the county. To be certain that our analysis in this follow-up response addressed the most current versions of the specific ordinances about which you inquire, our staff requested true copies of the respective ordinances from the City Attorney for the City of Marquette and from the prosecuting attorneys of the counties listed in your letter. Our response to you has been delayed, in part, awaiting receipt of those ordinances. Each will be addressed separately in our analysis.

CITY OF MARQUETTE

Because the sources of municipal authority to legislate are different for home rule cities and for counties, and because a portion of the City of Marquette city ordinance has been reviewed by the Michigan judiciary and found to be preempted by state law, we address first the City of Marquette's ordinance. A copy of the ordinance adopted by the City of Marquette is attached.

The City of Marquette is a home rule city. *Michigan Manual,* 1979-1980, p 448. The Home Rule City Act, MCL 117.1 *et seq,* in section 3(j), requires cities to provide in their charters for "the public peace and health and for the safety of persons and property." MCL 117.3(j). This "police power" of a home rule city "is of the same general scope and nature as the police power of the state, except as limited by the constitution or by statute." OAG, 1977-1978, No 5280, pp 393, 394 (March 23, 1978), citing *People v Sell,* 310 Mich 305; 17 NW2d 193 (1945); and *Tally v Detroit,* 54 Mich App 328; 220 NW2d 778 (1934).

The Michigan Supreme Court has construed the scope of home rule city police power expansively. *Butcher v Detroit,* 131 Mich App 698, 703; 347 NW2d 702 (1984), citing *Cady v Detroit,* 289 Mich 499, 514; 286 NW 805 (1939). Moreover, Const 1963, art 7, § 34 mandates that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor."

The City of Marquette ordinance begins with the general prohibition that "[n]o person shall smoke in a public place or in any business or place of employment except as permitted in this ordinance." City of Marquette Ordinance, section 35.01. Violation of the ordinance is declared to be a "public nuisance." *Id.*

"Public place" is defined as "any enclosed area to which the public is invited or in which the public is permitted, including but not limited to, banks, educational facilities, health facilities, laundromats, public transportation facilities, sports arenas, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, theaters and waiting rooms." City of Marquette Ordinance, section 35.02.7. Private residences are excluded from this definition. *Id.*

"Business" is defined as "any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes, including retail establishments where goods and services are sold as well as professional corporations or other entities where legal, medical, dental, engineering, architectural or other professional services are delivered." City of Marquette Ordinance, section 35.02.2.

"Place of employment" is defined as "any enclosed area under the control of a public or private employer which employees normally frequent during the course of employment, including, but not limited to, work areas, employee lounges and restrooms, conference and class rooms, employee cafeterias and hallways." City of Marquette Ordinance, section 35.02.6. Private residences are excluded from the definition of "place of employment" unless the residence is used as a child care, adult day care, or health facility. *Id.*

The remainder of the ordinance defines areas where smoking is allowed. Generally, smoking may occur at a distance of 20 feet outside any enclosed area where smoking is prohibited (City of Marquette Ordinance, section 35.03) and certain facilities are excluded (City of Marquette Ordinance, section 35.05.A), although owners or operators of those excluded facilities may declare that the entire establishment is a nonsmoking establishment. City of Marquette Ordinance, section 35.05.B.

It is manifest that the ordinance is concerned with abatement of the nuisance that exists when people smoke and that it is aimed at protecting the health of persons who are not smoking at the time but are exposed to the conditions created by the smoker's activities. The Marquette City Commission did not make specific findings when it adopted this ordinance, but similar ordinances or regulations adopted by county health departments typically recite the findings reported by various health agencies that document the adverse health effects of environmental tobacco smoke.

For example, the United States Surgeon General and the United States Environmental Protection Agency report that environmental tobacco smoke causes lung cancer in healthy adult

nonsmokers and can cause a small but significant reduction in lung function for children.[1] Additionally, in utero exposure is known to predispose children to long-term pulmonary risks.[2] Further, the United States Surgeon General has found that separating smokers and nonsmokers within the same air space may reduce but does not eliminate a nonsmoker's exposure to environmental tobacco smoke.[3]

The California Environmental Protection Agency has found that environmental tobacco smoke is a Group A Carcinogen – a category reserved for known cancer-causing agents in humans.[4] And the National Institute for Occupational Safety and Health has found that secondhand smoke poses an increased risk of lung cancer and possibly heart disease to people exposed at their worksites. It has recommended that nonsmokers should not be exposed to secondhand smoke and has found that nonsmokers can be protected by elimination of smoking in the building, or establishing separately ventilated smoking areas that exhaust directly to the outside.[5]

Finally, the United States Department of Health and Human Services, through its Public Health Service, National Toxicology Program, issues reports on carcinogens. For the first time, in its Ninth Official Federal Government Report issued on May 15, 2000, environmental tobacco smoke was specifically listed as a "Known human carcinogen," based on evidence that established a causal link between passive exposure to tobacco smoke and lung cancer.[6]

These studies find that tobacco smoke is a major contributor to indoor pollution and that breathing secondhand smoke is a cause of disease, including cancer, heart disease, and stroke in nonsmokers. At special risk are infants, children, teens, pregnant women, elderly people, nonsmokers with long-term exposure to secondhand smoke, individuals with cardiovascular disease, and individuals with impaired respiratory function, including the young, asthmatics, and

---

[1] U.S. Environmental Protection Agency, Fact Sheet: Respiratory Health Effects of Passive Smoking, at http://www.epa.gov/smokefree/pubs/etsfs.html.

[2] See http://www.epa.gov/smokefree/pubs/etsfs.html and link to http://cfpub2.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835.

[3] 1986 Surgeon General Report: (1986) The Health Consequences of Involuntary Smoking, at http://www.cdc.gov/tobacco/sgr/sgr_1986/index.htm. See also http://www.cdc.gov/tobacco/sgr/index.htm.

[4] See http://www.oehha.org/air/environmental_tobacco/index.html. See also http://www.arb.ca.gov/toxics/ets/finalreport/finalreport.htm.

[5] See *NIOSH Current Intelligence Bulletin 54: Environmental Tobacco Smoke in the Workplace (Lung Cancer and Other Health Effects) (NIOSH Publication Number 91-108)* at http://www.cdc.gov/niosh/91108_54.html.

[6] See http://www.niehs.nih.gov/oc/news/9thROC.htm [announcing new listing] and http://ntp.niehs.nih.gov/ntp/roc/eleventh/profiles/s176toba.pdf [the section of the most recently released 11th Report on Carcinogens -- "Tobacco Related Exposures"].

those with obstructive airway disease. Also harmed are those with health conditions induced by breathing secondhand smoke including asthma, lung cancer, heart disease, respiratory infection, decreased respiratory function, including bronchoconstriction and broncho-spasm.

In light of the above health concerns, it can be concluded that the police power conferred by section 3(j) of the Home Rule City Act, MCL 117.3(j), generally authorizes this type of ordinance adopted by the City of Marquette to protect the health of those who live in, work in, and visit the City. However, those provisions of section 35.05.A.2 of the City of Marquette Ordinance that restrict the portion of a restaurant designated for patrons who smoke to a lower percentage of total seating capacity than is provided for in section 12905(2) of the Public Health Code, MCL 333.12905(2), are preempted by that provision and are therefore unenforceable. *Michigan Restaurant Ass'n v City of Marquette*, 245 Mich App 63, 69-70; 626 NW2d 418 (2001), *lv den*, 466 Mich 862 (2002). This issue was addressed at length in the September 14, 2004, informational letter, *supra*, as was the question of whether an ordinance such as this one may ultimately be determined by the courts in Michigan to be inconsistent with, and thus preempted by, the provisions of the Michigan Clean Indoor Air Act, Part 126 of the Public Health Code, MCL 333.12601 *et seq*. Until the courts provide guidance as to the preemption issue or the Legislature clarifies the Public Health Code, the extent of a city's authority in this area of public health regulation will remain somewhat uncertain as noted in the September 14, 2004, informational letter.

CHIPPEWA COUNTY

The smoking restriction adopted in Chippewa County is not a county-wide ordinance passed by the county's board of commissioners, but rather it is a regulation adopted by the Chippewa County Health Department and approved by the county's board of commissioners. Effective November 8, 2004, section 1005.A.16 of the regulation was repealed, removing the requirement that smoking be prohibited in 80% of hotel and motel rooms rented to the public, and section 1008.A.5 was added, adding "manufacturers" to the list of areas not subject to the regulation.[7]

The question of the legality of this health regulation has not been presented to Michigan's courts nor has it been addressed in prior formal or informal opinions of this office. However, two formal opinions of the Attorney General, OAG, 1989-1990, No 6665, p 401 (November 15, 1990), and OAG, 2001-2002, No 7117, p 115 (September 11, 2002), offer considerable guidance in analyzing your question. In OAG No 6665, the Attorney General examined the respective authority of local health departments and county boards of commissioners to regulate the sale of tobacco to minors and the placement of cigarette vending machines. The opinion concluded that a county health department has the legal authority to adopt a regulation having county-wide effect to prevent the sale of tobacco to minors and to regulate or prohibit the placement of

[7] This regulation excludes "food service establishments" from its scope of operation in section 1008.A.1, which clearly includes restaurants. Thus, the prospect of preemption by the Michigan Clean Indoor Air Act sections of the Public Health Code, MCL 333.12601 – 333.12616, that was identified by the Michigan Court of Appeals majority in *Michigan Restaurant Ass'n, supra,* is not a matter of concern.

cigarette vending machines. OAG No 6665 at pp 404-405. Noting that counties have been empowered by statute to adopt only ordinances that relate to county affairs and that do not interfere with the local affairs of cities, villages, or townships, the opinion further concluded that counties generally lacked such authority, but could, by ordinance, place restrictions on vending machines "on county property." *Id.*, at p 404.

In the second opinion, the Attorney General opined that a county health department may adopt a regulation having county-wide effect limiting the amount of water that may be withdrawn from an underground aquifer. OAG No 7117 at p 117. As in OAG No 6665, however, the opinion noted that, had such an ordinance been adopted by the county's board of commissioners on its own, the ordinance would be effective only as to wells "on property owned or occupied by the county government or its boards, commissions, or agencies." OAG No 7117 at p 116.

The Public Health Code, MCL 333.1101 *et seq*, "grants to local health departments broad authority to adopt regulations necessary or appropriate to carry out their duties to protect the public health." OAG No 7117 at p 116. This authority is granted in sections 2435(d) and 2441(1) of the Public Health Code, which respectively provide:

> Sec. 2435. A local health department may:
>
> * * *
>
> (d) Adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination. [MCL 333.2435.]

and

> Sec. 2441.
>
> (1) A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations shall be approved or disapproved by the local governing entity. The regulations shall become effective 45 days after approval by the local health department's governing entity or at a time specified by the local health department's governing entity. The regulations shall be at least as stringent as the standard established by state law applicable to the same or similar subject matter. Regulations of a local health department supersede inconsistent or conflicting local ordinances. [MCL 333.2441.]

The Chippewa County health department regulation, like the City of Marquette ordinance, is concerned with abatement of the nuisance that exists when people smoke and is aimed at protecting the health of persons who are not smoking at the time but are exposed to the conditions created by the smoker's activities. As stated in section 1003 of the regulation, the

county health department made the following findings establishing the public health basis for the regulation:

A. Chippewa County Board of Commissioners hereby finds and declares that:

1. The U.S. Surgeon General, National Research Council, and National Academy of Sciences report that environmental tobacco smoke/secondhand smoke causes lung cancer in healthy adult nonsmokers, and can cause lung function and structure alteration to the fetus of pregnant nonsmoking women. Additionally, in utero exposure is known to predispose children to long-term pulmonary risks. Further, these agencies found separating smokers and nonsmokers within the same air space may reduce but does not eliminate a nonsmoker's exposure to environmental tobacco smoke/secondhand smoke.

2. The U.S. Environmental Protection Agency (EPA) has determined that environmental tobacco smoke/secondhand smoke is a Group A Carcinogen – a category reserved for known cancer-causing agents in humans.

3. The National Institute for Occupational Safety and Health (NIOSH):

(a) has determined that secondhand smoke poses an increased risk of lung cancer and, possibly, heart disease for people exposed in the worksite,

(b) recommends that nonsmokers should not be exposed to secondhand smoke, and

(c) has determined that nonsmokers can be protected by elimination of smoking in the building, or establishing separately ventilated smoking areas that exhaust air directly to the outside.

B. These studies find that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke is a cause of disease, including cancer, heart disease, stroke, asthma, and other respiratory problems in nonsmokers. At special risk are infants, children, teens, pregnant women, elderly people, and nonsmokers with long-term exposure to secondhand smoke, individuals with cardiovascular disease, and individuals with impaired respiratory function, including the young, asthmatics and those with obstructive airway disease.

C. Accordingly, the Chippewa County Commission finds and declares that the purpose of this regulation is to protect the public health and welfare by regulating smoking in public places and places of employment and recreation.

The regulation adopted by the Chippewa County Health Department and approved by the Chippewa County Board of Commissioners is a legitimate exercise of the authority conferred by sections 2435(d) and 2441(1) of the Public Health Code, MCL 333.2441 and MCL 333.2435(d).

GENESEE, INGHAM, AND WASHTENAW COUNTIES

Copies of the health regulations adopted by the Health Departments in Genesee, Ingham, and Washtenaw Counties, and respectively approved by the boards of commissioners of each of these counties, are attached. These regulations do not vary significantly in scope or purpose from the regulations adopted in Chippewa County.[8] Therefore, the same analysis and conclusion offered in connection with the Chippewa County Health Department regulation applies to uphold these regulations as a legitimate exercise of authority conferred by the Public Health Code.

Analysis of your question would not be complete, however, without considering the issue of statutory preemption.

The first sentence of subsection 1 of section 12605 of the Public Health Code provides:

> A smoking area may be designated by the state or local governmental agency or the person who owns or operates a public place, except in a public place in which smoking is prohibited by law. [MCL 333.12605(1).]

According to the majority position in the *Michigan Restaurant Association* case, *supra,* even discretionary action enabled by state law cannot be precluded by local ordinance. See 245 Mich App at 69-70. But the discretionary action of designating a smoking area is only available to the extent smoking at the public place has not been "prohibited by law."

This raises an issue as to whether, if smoking at a public place is prohibited by local health department regulation, adopted under authority derived from state law, smoking is "prohibited by law" within the meaning of section 12605(1) of the Public Health Code, precluding any action by the person or entity that owns or controls the public place to designate smoking areas.

This issue has not been addressed by the Michigan appellate courts nor by opinions issued by the Attorney General. Our research of prior Attorney General opinions, the legislative history of 1986 PA 198, the amendatory act that added this section to the Public Health Code, and judicial opinions for rulings in analogous situations has found nothing directly applicable that serves to guide the interpretive process. Thus, analysis of this question must rely on established principles of statutory construction.

---

[8] As with the Chippewa County Health Department regulation, the health regulations adopted in Genesee, Ingham, and Washtenaw Counties also exclude "food service establishments" from their scope of operation and, thus, do not apply to restaurants. See the respective health regulations at section 1010.1.3 (Genesee), section 1008.A.1 (Ingham), and 1008.A.1 (Washtenaw). See n 7 *supra,* for a discussion concerning preemption that applies equally here.

In *Mayor of Lansing v Michigan Public Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004), the primary rules were summarized as follows:

> [I]n construing a statute, we are required to give effect to the Legislature's intent. That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written. *Weakland v Toledo Engineering Co*, 467 Mich 344, 347; 656 NW2d 175 (2003).

Moreover, as emphasized in *Jones v Dep't of Corrections*, 468 Mich 646, 657; 664 NW2d 717 (2003):

> "Our most fundamental principle of statutory construction [is] that there is no room for judicial interpretation when the Legislature's intent can be ascertained from the statute's plain and unambiguous language." [Quoting *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).]

Thus, this issue is best resolved by resort to the language of the statute. The language that the Legislature chose, "prohibited by law," is broader than other language that it could have selected, such as "prohibited by statute" or "prohibited by state law." It is reasonable to conclude that, in selecting the broader language, the Legislature intended to protect the efficacy of prohibitions established by adoption of regulations as well as by statutes.

This conclusion is reinforced by consideration of the circumstances surrounding adoption of the relevant laws. When the Public Health Code was adopted in 1978 by 1978 PA 368, effective September 30, 1978, it did not include section 12605 and the other sections that comprise the Michigan Clean Indoor Act (sections 12601 through 12616). When those sections were added, section 2441, granting regulatory authority to local health departments, was already in existence and was within the Legislature's cognizance. Indeed, the Legislature is held to be aware of the existence of laws in effect at the time of its enactments. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993); *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991).

Therefore, if a county health department regulation prohibits smoking entirely in a particular public place, other than a restaurant, smoking there is "prohibited by law" and any effort by the person or entity in ownership or control of that public place to designate smoking in places within that public place would be ineffectual and the occasion for a preemption determination would not arise.

Sincerely,

Gary P. Gordon
Chief Deputy Attorney General

Atts.