

IN THE CIRCUIT COURT OF JACKSON COUNTY  
ASSOCIATE CIRCUIT DIVISION

CITY OF KANSAS CITY  
Plaintiff

V.

Case No. 0816-CR06724  
Division 25

GEORGIA JEAN CARLSON  
Defendant

ORDER

This matter pends before the Court as an appeal from the Municipal Court of Kansas City. The parties have filed a stipulation of facts that allows the Court to address Defendant's Motion to Dismiss without an evidentiary hearing.

Defendant is charged with violating Kansas City Ordinance Sec. 34-474 (c). That ordinance in pertinent part provides as follows.

**Sec. 34-474. Responsibilities of proprietors, owners and managers.**

(c) It shall be the responsibility of employers to provide smoke-free workplaces for all employees. Each employer having any enclosed place of employment located within the city shall adopt, implement, make known and maintain a written smoking policy which shall contain the following requirements:

Smoking shall be prohibited in all enclosed facilities within a place of employment without exception. This includes common work areas, auditoriums, classrooms, conference and meeting rooms, private offices, elevators, hallways, medical facilities, cafeterias, employee lounges, stairs, restrooms, vehicles, and all other enclosed facilities.

The parties have stipulated that the Defendant was a person having control of JC's Sports Bar and that that place is an "enclosed place of employment located within the City of Kansas City" and further that Defendant failed "to provide and maintain a workplace free of tobacco smoking by allowing patrons to smoke in the establishment." Based on these facts the City charged the Defendant with violation of Sec. 34-474 (c).

Defendant filed her Motion to Dismiss which in its essence asserts that the City is barred from prosecuting the Defendant under its ordinance because the State of Missouri has preempted the field and the City may not enforce its ordinance because it prohibits what state law has permitted.

Specifically Defendant relies on Missouri's Indoor Clean Air Act (ICAA) Sec. 191.765 through 191.777, R.S. Mo. That Act provides "A person shall not smoke in a public place or in a public meeting except in a designated smoking area." Sec. 191.767.1, R.S. Mo.

The Act defines the term "public place" as " any enclosed indoor area used by the general public or serving as a place of work" Sec. 191.765(5), R.S. Mo. A further refinement of this definition is found in Sec. 191.769.(5), R.S. Mo. Which provides *inter alia*:

**Areas not considered public places.**

(5) Bars, taverns, restaurants that seat less than fifty people, bowling alleys and billiard parlors, which conspicuously post signs stating that "Nonsmoking Areas are Unavailable";

Defendant argues that this refinement of the definition of public place prevents the City from enforcing its Ordinance since in the Defendant's view this part of the statute permits that which the City has prohibited.

The City argues that this is merely an exemption from state regulation under the ICAA and not a specific grant of permission to allow smoking in such establishments. As such the City asserts it is free to enact and enforce an ordinance that covers such establishments and goes beyond the ICAA .

It should be noted that the State could have but did not expressly provide that there could be no further regulation of smoking by any other authority. The Court as expressed to the parties at oral argument is not convinced that a definitional exclusion of certain businesses under the ICAA is the same as a specific declaration of preemption.

In fact the ICAA itself contemplates that there are circumstances that would allow regulation beyond what is covered by its terms. The ICAA in Section 191.767(2) specifically allows further prohibitions of smoking when enacted by ordinance. By its actual terms the ICAA makes an exception to its terms and therefore recognizes that there are places where "smoking is prohibited by the fire marshal or by other law, **ordinance** or regulation". (Emphasis added)

The State has not preempted the field and the City is free to enact and enforce ordinances that go beyond the ICAA. Accordingly the Defendant's Motion to Dismiss should be and is hereby overruled.

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Date

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Richard T. Standridge, Judge

(NOTE: This case upheld the Kansas City anti-smoking ordinance enacted by the voters and was affirmed by the Court of Appeals on June 23, 2009, WD70576)