

# City of Lawrence Smoking Prohibition Upheld Under Home Rule

by Lisa K. Patterson

From city commission direction to an ordinance upheld by the State Supreme Court, the story of Lawrence's smoking prohibition began in 2003, when then-Mayor David Dunfield created a task force to study the issue of smoking in workplaces. The task force, made up of representatives from nightclubs, restaurants, public health agencies, and businesses, studied the issues of employee health, business growth, and air-filtration systems for nearly a year.

The City Commission, after much discussion and public comment, in May 2004 adopted the Lawrence Public and Workplace Smoking Restriction ordinance prohibiting smoking in enclosed public places and places of employment within the city. To prepare for the July 1, 2004 effective date, the City assembled the educational components and began notifying businesses. The Mayor and Health Department Director delivered a joint message outlining the responsibilities of businesses under the new law and included sample signs and recommended policies.

The story of the Lawrence smoking prohibition is about public health and the successful use of the city's home-rule powers to regulate smoking. This summer's ruling by the Court upheld the ordinance as constitutional. The debate landed in the Supreme Court when a Lawrence nightclub owner petitioned the Douglas County District Court for an order prohibiting the city from enforcing the ordinance. The club owner claimed the ordinance was unconstitutionally vague and pre-empted by the state laws regulating smoking. Failing to persuade the district court on either point, the night club owner appealed the district court ruling and requested a transfer to the Kansas Supreme Court.

## Supreme Court Ruling

On the pre-emption issue, the club owner argued that the City's ordinance prohibited an activity authorized by state law, and that, therefore, it was pre-empted. The Supreme Court disagreed. The Court observed that the Legislature expressly recognized that cities may regulate smoking, as long as the regulation is at least as stringent as the state law. The Court wrote, "... the Legislature has invited cities to regulate smoking in public places to the maximum extent possible." The Court added that, in its view, "stringent regulation" can include an absolute prohibition on smoking.

Nor did the Court side with the club owner on his vagueness claim. The Court found the City's ordinance provided sufficient

warning and fair notice concerning the prohibited conduct in light of common understanding. The ordinance also contained the requisite clarity to guard against discriminatory and arbitrary enforcement.

In preparing for the Supreme Court hearing, the City enlisted the League of Kansas Municipalities to prepare a *Amicus Curiae* brief or a friend of the court brief, supporting the City's authority to regulate smoking in public places. Responding to the request, the League's board voted to prepare the brief and weighed in on the appropriate use of Home Rule by Lawrence.

## Enforcement

The Fire Medical Department was delegated enforcement of the City's ordinance. Enforcement is complaint driven unless violations are observed during routine activities such as occupancy checks and prevention inspections. The Lawrence Police Department assists in enforcement of the smoking regulations, issuing citations to smokers observed violating the city ordinance. The number of complaints declined sharply after the first few weeks following the effective date of the law.

## Impacts

While city commissioners heard from numerous citizens on both sides of the issue, city planners heard from business owners working to adjust to the new climate. Restaurant and drinking-establishment owners began seeking alterations to site plans for outdoor seating. Smoking is permitted in unenclosed places, like patios, unless the owner chooses not to allow smoking in patio areas. Existing patios were retrofitted to house patrons throughout the seasons while preserving the patio areas as unenclosed areas.

In July and August 2004, 13 applications for decks and outside seating were received. In 2005, a second wave of requests to change existing uses totaled 13 applications. Some applications for alterations stated the purpose was to create a smoking area. This number in applications was rare. Since 1979, the planning department had rarely seen more than two applications a year.

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# Legal Forum



## Lawrence Smoking Ordinance Upheld. . .

After many long months, the Kansas Supreme Court handed down two long-awaited decisions affecting Kansas cities. The first, *Steffes v. City of Lawrence*, \_\_\_ Kan. \_\_\_, 160 P.3d 843 (2007), upheld the City of Lawrence smoking regulation ordinance. The opinion is very broad and should serve to validate smoking ordinances across the state and the authority of cities to regulate in this area. The other case, *Farha v. City of Wichita*, \_\_\_ Kan. \_\_\_, 161 P.3d 717 (2007), will be discussed next month.

The City of Lawrence adopted an ordinance to prohibit smoking in public places and places of employment. The city established, in the ordinance, that the right to breathe smoke-free air had priority over the choice to smoke.

The penalty provision allows the manager or other person in charge of an establishment to be cited for a violation if he or she has knowledge that smoking is occurring and acquiesces to the smoking under the totality of the circumstances.

The plaintiff, Dennis Steffes, owns two bars in Lawrence and was cited under the ordinance for failing to provide a smoke-free workplace for employees and failing to prohibit smoking inside his bars. He sued the City of Lawrence on the basis that K.S.A. 21-4010 pre-empted cities from prohibiting smoking and that the ordinance adopted by the City was unconstitutionally vague.

The Kansas Supreme Court first addressed the statutes regarding smoking. First, K.S.A. 21-4010 states in part, "[s]moking areas may be designated by proprietors or other persons in charge of public places, except in passenger elevators, school buses, public means of mass transportation, and any other place in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation."

In addition, K.S.A. 21-4013 states, "Nothing in this act shall prevent any city or county from regulating smoking

by Sandy Jacquot

within its boundaries, so long as such regulation is at least as stringent as that imposed by this act. In such cases, the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act."

Part of the plaintiff's argument was that the city's ordinance prohibited an activity authorized by state law and, therefore, conflicted with state statute.

Thus, Steffes argued that the city ordinance was pre-empted by state statute. The Kansas Supreme Court disagreed and indicated that nothing posited by Steffes supported his contention of a conflict-based pre-emption.

The Court stated that the Legislature implicitly acknowledged that the city could, with an ordinance, prohibit smoking in public places. Because the city did what the statute allowed, there could be no conflict. The plaintiff tried to narrow the authorizing language to allow cities to extend prohibitions only to transportation areas, because of the language regarding elevators, buses, and other means of mass transit.

In noting that the language of the statute actually undermines the plaintiff's position, the Court stated that the statute expressly sets forth "and any other place in which smoking is prohibited...." The Court went on to state that the statute invites cities to regulate smoking to the "maximum extent possible" and further noted that a more stringent regulation could include an absolute prohibition. In other words, the statute created a floor but not a ceiling. That should be instructive for other cities wanting to prohibit smoking in public places.

The next issue was whether the trial court erred in not finding the enforcement section of the ordinance and the violations

and penalties section unconstitutionally vague. The enforcement section states who may initiate a complaint and which city officials may enforce the ordinance.

It also sets forth the responsibilities of the establishment manager, owner, or operator with regard to the smoking ordinance. The standards for a court reviewing the constitutionality of an ordinance are similar to the standards for reviewing a statute.

The appellate courts are to preserve the validity of an ordinance by presuming that the ordinance is constitutional unless it is clearly shown to be unconstitutional, which is a weighty burden for the plaintiff.

The ordinance, to be found constitutional, must "convey sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding and practice."

The plaintiff argued that the requirement of a manager or owner to "have knowledge" of a violation was vague and did not meet the requirement of intent to violate the ordinance. The Court, however, agreed with the League that "knowledge" adequately states "intent" and was not unconstitutionally vague. In addition, the Court found that the city's ordinance "conveys sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding: allowing smoking in prohibited places by knowledge that it is occurring and acquiescence to it as determined under the totality of the circumstances." Therefore, the Court upheld the constitutionality of the City of Lawrence smoking ordinance.

For those who would like to read the opinion, the following is a link to the case on the Kansas Judicial Branch website, <http://www.kscourts.org/kscases/supct/2007/20070622/96838.htm>.

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## Lawrence Special Populations Division Receives Award

The City of Lawrence Parks and Recreation Department's Special Populations Division has been awarded the Kansas Inclusive Communities Award for 2007. The award will be formally presented to the City of Lawrence at the InterHab State Conference October 10-12 in Wichita, Kansas.

InterHab is the resource network for Kansans with disabilities and links agencies together across the state. The award is for programs and services that promote community inclusion for persons with developmental disabilities. The Lawrence Parks and Recreation Special Populations Division was nominated by staff at Cottonwood, Inc.

The Special Populations Division is headed up by Annette Deghand, who was singled out in the nomination for her work in developing inclusive programs and for encouraging individuals with disabilities to take part in any program offered by the department.

"We are extremely pleased to be recognized for our special-populations programs," Ernie Shaw, Interim Director of Lawrence Parks and Recreation, said. "Annette has a tremendous rapport with her clients and looks at the needs of both children and adults. Her dedication in creating an environment of inclusion has assisted the department to be nationally recognized for its programming. She continues to be an amazing influence in her clients' lives and to the department."

## Wichita Receives High Marks for Relocating Families

Worldwide ERC and Primacy Relocation recently tabbed Wichita as the No. 2 medium-sized metro in the country for relocating families. The Air Capital of the World trailed only Knoxville on the annual ranking.

"Kansans have always known what a family-friendly city Wichita is," said David Kerr, Secretary of the Kansas Department

of Commerce. "There are few places in the country that can stack up to Wichita in terms of overall quality of life."

Titled Best Cities for Relocating Families, the study focuses on the ease with which a family can move to a new city and settle into a new life. Utilizing current data on the 150 most populous metropolitan areas and encompassing nearly 50 factors important to relocating families, the report strives to provide businesses, families, and media with one convenient resource for detailed information.

This year's report puts increased emphasis on the real estate market, which is currently one of the most significant issues in relocation. Key criteria include: home prices, indexed home affordability, property taxes, rent costs, recreation and leisure, arts and culture, air quality, sales tax, unemployment rates, and school expenditures per student.

## AAKC Celebrates 15 Years of Being an LKM Affiliate

The Administrative Assistants of Kansas Cities (AAKC) organization was formed on January 7, 1992 at a meeting attended by 17 secretaries from Kansas cities. The group became an affiliate of the League of Kansas Municipalities on July 18, 1992.

The organization was formed from a desire to promote and improve proficiency of its members and public administration in Kansas, and to provide a network of information, ideas, and support for its members.

AAKC members must: 1) Be employed by a Kansas municipality having a City Manager or City Administrator, and 2) Work directly with the City Manager, Assistant City Manager, Department Head, Administrator, or Supervisor in the position of Administrative Assistant or Secretary.

By meeting specified criteria, members of the organization can attain their CMA (Certified Municipal Assistant) certification. For more information on the organization, visit [www.aakc.org](http://www.aakc.org), or contact AAKC President Carolyn Sturgeon in the Lenexa City Manager's Office at [csturgeon@ci.lenexa.ks.us](mailto:csturgeon@ci.lenexa.ks.us) or (913) 477-7550.

## Oxygen Masks for Pets Donated to the KCK Fire Department

The Kansas City, Kansas, Fire Department is receiving six sets of oxygen masks for cats and dogs which were donated by the Great Dane Club of Greater Kansas City. Each set includes masks for different sizes of dogs and cats.

For years, firefighters have improvised human masks to administer oxygen to cats and dogs that have suffered the effects of smoke inhalation. These masks, which are specifically designed for animal use, will greatly enhance the effectiveness of oxygen delivery. The devices will be placed in the command vehicles that are sent to all structure fires.

While, obviously, the priority of the department will remain the lives and safety of people, it will be useful to have specific equipment for use with pets. In many cases, people are able to evacuate a building safely, while pets may be in an area that they can't escape. For this reason, the oxygen masks will be a nice piece of equipment to help save the lives of family pets.

## Passages

**Arden K. Ensley**, 79, former Staff Attorney for the League of Kansas Municipalities and Reviser of Statutes for the State of Kansas, died July 26, 2007.

Ensley was born on September 25, 1927 in Tulsa, Oklahoma, eventually moving to southeast Kansas with his family. He obtained a bachelor's degree from Kansas State University in 1951 and graduated from the Washburn University Law School in 1954.

He worked for LKM from 1956 to 1965 as a staff attorney before going to work for the State of Kansas. He had a long career in state government, eventually advancing to the position of Kansas Reviser of Statutes, a position he held from 1979 until 1989.

His career in public service also included time in the U.S. Army, and he was a long-time member of Philip Billard Post No. 1650, V.F.W. and Capitol Post No. 1 of the American Legion.