

IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

FLAT CREEK DEVELOPMENT COMPANY,)
a Wyoming Corporation, d/b/a)
"The Virginian Saloon;" and)
WYOMING CONTRACTORS ASSOCIATION,)
INC., a Wyoming nonprofit corporation;)
WYOMING TRUCKING ASSOCIATION, INC.,)
a Wyoming nonprofit corporation; and)
WYOMING STATE LIQUOR ASSOCIATION,)
INC., a Wyoming nonprofit corporation,)

Civil Action No. 15027

Plaintiffs,)

vs.)

TETON HEALTH DISTRICT, TETON COUNTY)
WYOMING, a district health department; and)
TETON DISTRICT BOARD OF HEALTH,)

Defendants.)

FILED
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D. Hester, Deputy Clerk
CLERK OF DISTRICT COURT

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DECLARATORY JUDGMENT STRIKING 2009 SMOKEFREE AIR RULE**

This controversy arose in a Complaint for Declaratory Judgment, Preliminary Injunction and Permanent Injunction filed by Flat Creek Development Company, a Wyoming corporation d/b/a The Virginian Saloon, and associations representing the contracting, trucking, and bar/restaurant industries. The groups have challenged the 2009 Smokefree Air Rule promulgated by the Teton District Board of Health because of anticipated loss of business, costs of compliance, threat of criminal prosecution, and responsibility it places on employers to monitor each employee's personal life style choices. The groups challenge the statutory authority of the District Board of Health in adopting the Smokefree Air Rule and raise five additional constitutional issues.

General Background

Since 2004, thirty-one state legislatures have passed statewide smoking bans with a common intent of protecting non-consenting individuals from exposure to tobacco smoke in the public domain. Patrick Kabat, *"Till Naught But Ash Is Left to See": Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 128, 134 (Winter 2009). "From this common purpose, however, a chaotic landscape of wildly varying legal regimes has ensued. Though they may agree that non-smokers should be protected from secondhand smoke, lawmakers have struggled to determine how and where the line between smoking and non-smoking domains should be drawn." *Id.* at 135. When legislatures have failed to act, four states enacted ETS (Environmental Tobacco Smoke) regulations by ballot initiatives.¹

¹ These states include Washington, Ohio, Arizona, and Nebraska. Ballot initiatives have been criticized as a "blunt tool for a delicate task" in that they focus attention on a yes-or-no policy question at the expense of discrete elements within the proposal. Further, ballot initiatives may reduce the opportunity for meaningful public deliberation, inadequately represent the interests of stakeholders, and offer limited executive and judicial remedies. Patrick Kabat, *"Till Naught But Ash Is Left to See": Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 128, 165-174 (Winter 2009).

Wyoming is one of sixteen states classified as “hands-off states.” *Id.* at 140. These states have not adopted general prohibitions on smoking in restaurants, bars, and most workplaces, leaving the matter to local jurisdictions. *Id.* Typically, in Wyoming, regulation of smoking has been accomplished through municipal ordinances and/or municipal ballot initiatives. Several municipalities in Wyoming—including Laramie, Cheyenne, Evanston, Green River and Rock Springs—have passed ordinances banning smoking to some extent, but these laws were enacted by elected boards, not appointed Boards of Health. In Teton County, the Jackson Town Council has considered and rejected a city ordinance regulating smoking in public facilities. Many restaurants and bars in Jackson, however, have voluntarily declared their establishments no smoking areas. According to Plaintiffs, the Virginian Saloon is the only bar and restaurant within Teton County which allows its patrons to smoke on or within its premises.

The institution of a smoking ban by an appointed District Board of Health, rather than by an elected body through a municipal or county ordinance, is an unprecedented action in this state. The action raises questions of first impression regarding the authority of a local district board of health with respect to the Wyoming Statutes and Wyoming Constitution. Both parties have filed Motions for Summary Judgment, and the Court heard oral argument on July 1, 2010. Plaintiffs were represented by attorneys Steven F. Freudenthal and Frank Hess. Defendants were represented by Deputy County Attorney Nicole G. Krieger. After hearing argument, reviewing briefs, affidavits, and exhibits, and conducting an extensive review of nationwide precedent and scholarly commentary, the Court finds as follows.

Background Facts

1. The Teton District Health Department and Teton District Board of Health [“District Board of Health”] were created by resolution of the Teton County Commissioners pursuant to Wyo. Stat. § 35-1-301² on June 7, 2005, and board members were duly appointed by the Commissioners. The District Board of Health has jurisdiction throughout all unincorporated areas of Teton County as well as within the municipality of Jackson, pursuant to Wyo. Stat. § 35-1-303(b).³ The District Board of Health has since promulgated rules on Food Safety (August 2006); Spas and Swimming Pools (August 2006); and Body Art (May 2007).
2. On March 24, 2009, the District Board of Health adopted the “Rules for Teton District Smokefree Air Rule of 2009,” [“Smokefree Air Rule”] effective May 23, 2009, pursuant to Wyo. Stat. § 35-1-303.⁴ The stated purpose of the rules is to protect the public health and welfare by prohibiting smoking in public places and places of employment.
3. The Smokefree Air Rule prohibits and criminalizes smoking in such areas as all enclosed public places within Teton County, all enclosed facilities within places of employment (including vehicles), in certain outdoor areas such as outdoor seating and service lines, and generally within twenty feet of outside entrances, operable windows and ventilation

² Wyo. Stat. § 35-1-301(b) allows that “[a]ny county, municipality, or district may, by resolution of the board of county commissioners or municipal governing body or by a majority of the votes cast by the qualified electors of such county, municipality, or district, establish and maintain a county, municipal, or district health department.”

³ Wyo. Stat. § 35-1-303(b) provides as follows:

The jurisdiction of the county and/or city or district health department shall extend over all unincorporated areas and over all municipalities within the territorial limits of the county or counties comprising the district except municipalities of Class I may maintain their own health departments. However, any municipalities of Class I may merge its health services with that of the county or district in which such city is located.

⁴ The rulemaking authority of district boards of health is established in Wyo. Stat. § 35-1-303(a), as follows:

County and/or city and district boards of health may enact rules and regulations pertaining to the prevention of disease and the promotion of public health in the area over which such respective boards have jurisdiction. But in no instance shall such rules and regulations be less effective than, or in conflict with, rules and regulations promulgated by the state department of health. The district and/or city health officers shall have all powers vested by law in county health officers.

systems of enclosed areas where smoking is prohibited. "No Smoking" signs must be posted in every public place and place of employment, including vehicles, and ashtrays must be removed. Smoking is not regulated in private residences, except when used as a childcare, adult day care or health care facility; hotel and motel rooms; private clubs, except when being used by function open to the general public; and retail tobacco shops.⁵ See Attachment A—Smokefree Air Rule of 2009.

4. Pursuant to the Smokefree Air Rule, violators, including not only smokers but also owners, managers or operators of public places or places of employment, would be guilty of a misdemeanor as provided in Wyo. Stat. § 35-1-106.⁶ Each day of violation would be considered a separate and distinct violation. Violations under Wyo. Stat. § 35-1-106 carry a maximum fine of up to \$1,000 and imprisonment for not more than one year, or both.
5. The Smokefree Air Rule was promulgated in compliance with the Wyoming Administrative Procedure Act regarding protocol for rulemaking, and public hearings were held. The District Board of Health voluntarily agreed to refrain from enforcing the 2009 Smokefree Air Rule pending the outcome of the current litigation.

Standard of Review

6. Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.R.C.P. 56(c). "A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense that has been asserted by the parties." *Trabing v. Kinko's Inc.*, 57 P.3d 1248, 1252 (Wyo. 2002); *Williams Gas Processing-Wamsutter Co. v. Union Pacific Resources Co.*, 25 P.3d 1064, 1071 (Wyo. 2001). "Summary judgment is appropriate in a declaratory judgment action so long as there are no genuine issues of material fact." *Snake River Brewing Co., Inc. v. Town of Jackson*, 39 P.3d 397, 402 (Wyo. 2002).
7. In their respective Motions for Summary Judgment, both parties have declared that there are no genuine issues of material fact. However, at the hearing, Plaintiff's attorney Mr. Freudenthal argued that there was no uncontroverted evidence in the record that secondhand smoke causes disease. He noted that Teton County Public Health Manager Terri Gregory's single affidavit regarding the danger of secondhand smoke cited only research performed by others. Having conducted no primary research herself, Mr. Freudenthal questioned Ms. Gregory's competence to testify that secondhand smoke causes disease. He further alleged that there was reasonable scientific dispute on the subject, although he cited no studies with alternative findings. In sum, Mr. Freudenthal challenged the fact that the regulation of secondhand smoke was related to the prevention of disease or the promotion of public health, which is the claimed statutory authority for enacting the rules.

⁵ The Smokefree Rule, which does not exempt tobacco lounges and prohibits smoking in virtually the entire indoor public domain and some of the outdoor domain, including smoking within a certain distance of a building entrance, window or ventilation intake, would be classified by a Yale commentator as the most aggressive, or "draconian," end of the smoking ban spectrum. Patrick Kabat, "Till Naught But Ash Is Left to See": *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 128, 144-45 (Winter 2009). This type of rule is representative of the most recent wave of smoking bans often drafted by health advocacy lobbies and passed as ballot initiatives rather than debated and passed by lawmakers. *Id.* at 145.

⁶ This is a general criminal penalty provision in the Public Health and Safety Act. Wyo. Stat. § 35-1-106 provides as follows:

Any person who shall violate any of the provisions of this act, or any lawful rule or regulation made by the state department of health pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by any state, county or municipal health officer pursuant to the authority granted in this act shall be deemed guilty of misdemeanor, and shall be punished except as otherwise provided therein by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than one (1) year or by both such fine and imprisonment.

8. The Court notes that there has been considerable research on the health effects of smoking and being subjected to secondhand smoke. In addition to the sources Ms. Gregory has cited, the United States Surgeon General has recently released its thirtieth in a series of reports that span a nearly fifty-year period, all of which have documented "the overwhelming and conclusive biologic, epidemiologic, behavioral, and pharmacologic evidence that tobacco use is deadly." Office of the Surgeon General, U.S. Department of Health and Human Services, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease* at iii (released Dec. 9, 2010). This latest report substantiates the evidence that "there is no safe level of exposure to cigarette smoke," whether inhaling "directly or secondhand."⁷ *Id.*
9. The rising incidence of tobacco-related illnesses attributed to secondhand smoke cannot be ignored. The Court believes the correlation between smoking or secondhand smoke and disease to be a matter beyond reasonable controversy and does not believe it constitutes a material fact in issue. However, even if the causal link between secondhand smoke and disease is not conclusively established, the Court finds that its disposition of this matter does not turn on the deleterious effect of environmental tobacco smoke. It turns, rather, on the authority of the District Board of Health to promulgate a rule to restrict smoking in public areas. In determining the scientific facts related to smoking and health to be reasonably established but immaterial, the Court concludes that there are no genuine issues of material fact, and the parties are entitled to judgment as a matter of law.

Legal Issues

10. Plaintiff's Complaint seeks a declaratory judgment from the Court that the Smokefree Air Rule is void and unenforceable for the following reasons:
- Count I: The District Board of Health is without authority to adopt and enforce the 2009 Smokefree Air Rule in the absence of a specific delegation of such authority by state statute.
 - Count II: The 2009 Smokefree Air Rule is pre-empted by the Wyoming Constitutional requirement for laws of a general nature and uniform operation.
 - Count III: The 2009 Air Rule denies Plaintiffs equal protection under the United States and Wyoming Constitutions.
 - Count IV: The 2009 Air Rule is void for adoption as an exercise of absolute, arbitrary power over the lives, liberty and property of freemen, pursuant to Wyo. Constit. Art. 1, Section 7.
 - Count V: The 2009 Air Rule is void within each municipality within Teton County as an unlawful delegation of control over municipal functions.
 - Count VI: Chapter 10-3 of the 2009 Air Rule, a criminal statute, is void for vagueness.
11. In Count I, Plaintiffs allege that the District Board of Health, in promulgating the Smokefree Air Rule, not only exceeded its rulemaking authority granted by statute, but also violated the nondelegation (or separation of powers) doctrine in the Wyoming Constitution by exercising legislative power. The Court considers the issues raised in Count I to be dispositive and declines to consider Counts II through VI.

⁷ Some jurisdictions have taken judicial notice of U.S. Surgeon General Reports on the effects of smoking. *See, for example, Brooks v. Manissee*, 2009 WL 6006283 at 5 (W.D.La.) ("[T]he court takes judicial notice, pursuant to Fed.R.Civ.P. Rule 201, that the United States Surgeon General's June 2006 report concluded that scientific evidence shows there is no safe level of or exposure to second hand smoke."); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 482 n.16 (Mass. 2004) ("We take judicial notice of a comprehensive report of the Surgeon General of the United States, released on May 27, 2004 . . . [that] presents persuasive evidence that smoking harms nearly every organ of the human body, causes many diseases and reduces the health of smokers in general."); *DeMatteo v. DeMatteo*, 749 N.Y.S.2d 671, 677 (N.Y. Sup. Ct. 2002) ("Because the 1986 Report of the Surgeon General was extensively relied upon by the New York State Legislature and the Governor, the Court takes Judicial Notice of those specific facts and conclusions . . .").

Analysis

Synopsis: The Smokefree Air Rule fails both as rulemaking beyond agency authority and as an improper exercise of a non-delegable legislative power.

I. Rulemaking Authority of the Teton District Board of Health

Summary: An administrative agency has the authority to promulgate rules to the extent expressly conferred by statute and clearly within the legislative intent behind the statute. In enacting the Smokefree Air Rule, the District Board of Health exceeded its rulemaking authority.

12. Wyoming Statute § 35-1-303(a) grants broad rulemaking authority to district boards of health:

(a) County and/or city and district boards of health may enact rules and regulations pertaining to the prevention of disease and the promotion of public health in the area over which such respective boards have jurisdiction. But in no instance shall such rules and regulations be less effective than, or in conflict with, rules and regulations promulgated by the state department of health. The district and/or city health officers shall have all powers vested by law in county health officers.

13. The District Board of Health argues that the clear and unambiguous language of § 35-1-303(a) gives boards of health broad authority to enact rules and regulations to prevent disease and promote public health, and nothing limits this authority so long as the purpose of the enacted rule remains the promotion of public health or the prevention of disease. The District Board of Health urges liberal construction of the statutory language:

While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interest confided to them, have always received from the courts a liberal construction; and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities.

Bd. of Trustees of Memorial Hospital of Sheridan County v. Pratt, 262 P.2d 682, 687 Wyo. 1953) (citations omitted).

14. In general, the Wyoming Supreme Court has found that

administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted. The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. However, the inherent or implied power of an administrative agency is not boundless.

Voss v. Goodman, 2009 WY 40, ¶ 11, 203 P.3d 415, 420 (Wyo. 2009) (quoting *BP Am. Prod. Co. v. Dep't of Revenue*, 2006 WY 27, ¶ 28, 130 P.3d 438, 466-67 (Wyo. 2006)).

15. In this particular instance, the Court does not read § 35-1-303(a) to vest local boards of health with unlimited authority to adopt regulations addressing all public health concerns. The statutory language itself constrains the rulemaking of local boards: “[I]n no instance shall rules and regulations be less effective than, or in conflict with, rules and regulations promulgated by the state department of health.” Accordingly, the Court refers to the rulemaking authority and rules of the State Department of Health.

16. The State Department of Health is granted rulemaking authority "as shall in its judgment be necessary to the carrying out of the provisions of this act." ["Department of Health Act"] Wyo. Stat. § 35-1-229. The powers and duties of the State Department of Health are set forth in Wyo. Stat. § 35-1-240. These pertain largely to the control of communicable diseases, distributing vaccines, setting and enforcing sanitary standards, operating a public health nursing program, regulating the disposal of the dead, collecting vital statistics, and disseminating public health information. The statute does not specifically mention regulating indoor air or creating smoke-free environments in the interest of public health. The provisions of the statute most relevant to the smoke-free air issue are as follows:
- To investigate and control the causes of epidemic, endemic, communicable, occupational and other diseases and afflictions, and physical disabilities resulting therefrom, affecting the public health.
 - To abate nuisances when necessary for the protection of the public health.
- Wyo. Stat. § 35-1-240(a)(ii) and (v). Regardless of the roots and reach of the authority for regulating in this area, the Department has, to date, *not* promulgated any rules or regulations regarding smoke-free public places or places of employment.
17. The Wyoming Supreme Court has instructed that in "[i]nterpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia*; and in ascertaining the meaning of a given law, all statutes relating to the same subject or hav[ing] the same general purpose must be considered and construed in harmony." *Fontaine v. Board of County Com'rs of Park County*, 4 P.3d 890, 894 (Wyo. 2000) (citations omitted). Considering *in pari materia* Wyo. Stat. § 35-1-303, the statutory rulemaking authority of a district board of health, which is constrained by the rules and regulations of the State Department of Health, and Wyo. Stat. § 35-1-229 and 240, which pertain to the rulemaking authority and purview of the State Department of Health, the Court concludes that a district board of health is limited to rulemaking in those broad areas the State Department of Health has chosen to regulate. To read those statutes otherwise would mean that local non-elected boards could act in any area of health the State Department has chosen not to act. Such local non-elected boards would have free rein to adopt any rules within their broad grant of authority, unfettered by the State Department's interpretation of the Department of Health Act, and without knowing whether such rules would "be less effective than, or in conflict with" State Department of Health rules and regulations. See Wyo. Stat. 35-1-303(a).
18. The Court is further troubled by the lack of oversight in the Board of Health's promulgation of the Smokefree Rule. The Court notes that rules promulgated by the State Department of Health—just as the rules of all state departments—are subject to approval by the Governor. The Wyoming Administrative Procedure Act requires that "[a] state agency rule or any amendment, repeal, modification or revision of the rule may be filed with the registrar of rules unless the rule has been submitted to the governor for review and the governor has approved and signed the rule." Wyo. Stat. § 16-3-103(d). No such oversight appears to exist at the local level. Although district boards of health rules are not subject to approval by the Governor, it is notable that the Smokefree Air Rule has not been reviewed or approved by any *elected* board or official within the District of Teton County. Further, the Court notes that local elected authorities, who purportedly have the power to pass no smoking ordinances and have done so elsewhere in Wyoming, have chosen not to do so in Jackson. The municipal authority of the City of Jackson, the Jackson Town Council, has considered and refused to adopt a city ordinance regulating smoking in public facilities.
19. Also missing in the enactment of a smoking ban is any direction from the Wyoming Legislature. Over the years, numerous attempts to pass a bill that would regulate smoking statewide or authorize counties to regulate smoking have failed. Thus, there is no statewide regulation of secondhand smoke, nor has any policy or intent regarding the issue been articulated by the legislature.

20. In considering the extent of the authority of an administrative agency, the Wyoming Supreme Court has held that an agency has only those powers expressly conferred by statute:

When reviewing an administrative agency's decision, this court will consider, among other factors, whether the agency exceeded its statutory authority. As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do. Any agency decision that falls outside the confines of the statutory guidelines articulated by the legislature is contrary to law and cannot stand. Such decisions are arbitrary and capricious.

Tri County Telephone Ass'n, Inc. v. Wyoming Public Service Com'n, 910 P.2d 1359, 1361 (Wyo. 1996) (citations omitted). Further, "[s]tatute will be strictly construed when determining the authority granted to an agency. . . . In other words, reasonable doubt of the existence of a power must be resolved against the exercise thereof. A doubtful power does not exist." *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001) (citations omitted).

21. This legal principle of limited powers applies to an agency's authority to promulgate rules: "An agency may not exceed its statutory authority in promulgating rules. Administrative agencies have only those powers expressly conferred by statute. This legal principle applies with equal force to an agency's authority to promulgate rules. Rules promulgated in excess of an agency's statutory authority are null and void." *McLean v. Hyland Enterprises, Inc.*, 34 P.3d 1262, 1270 (Wyo. 2001) (citation omitted). Pursuant to the Wyoming Administrative Procedure Act, a rule is valid (and thus may be signed by the governor) if it is "within the scope of the statutory authority delegated to the adopting agency" and "appears to be within the scope of the legislative purpose of the statutory authority." Wyo. Stat. §§ 16-3-103(d)(i), (ii).
22. In review, there is no express statutory authority for the State Department of Health to promulgate rules to regulate air quality generally or prohibit smoking in public places specifically. To the extent such authority can be implied in statutory provisions granting broad, general authority to the State Department of Health to regulate in this area, the State Department of Health has not chosen to do so. While local district boards of health may regulate in areas to prevent disease and promote public health, they are limited to rulemaking that is not in conflict with, or less effective than rules of the State Department of Health. Without rulemaking precedent by the State Department of Health in the environmental tobacco smoke area, or clear legislative intent to expand the powers of local boards to regulate in this area, the District Board of Health has exceeded its rulemaking authority in promulgating the 2009 Smokefree Air Rule.⁸

⁸ Defendant Board of Health has cited three cases where courts have upheld smoke free rules enacted by local boards of health in West Virginia, Massachusetts and Kentucky. See, *Foundation for Independent Living v. Cabell-Huntington Board of Health*, 591 S.E. 2d 744, 751 (W.Va. App. 2003); *American Lithuanian Naturalization Club v. Bd. of Health of Athol*, 844 N.E. 2d 231, 234 (Mass. 2006); and *Richardson v. Hopkins County Board of Health*, Civil Action No. 08-CI-01116 (Hopkins Cir. Ct. Ky, filed Jan. 5, 2009). The Court notes, however, that in West Virginia the statute which sets forth the powers and duties of local boards of health specifically provides that the boards promote and protect clean and safe air. W.Va. Code, § 16-2-11(a)(1)(ii). Massachusetts has legislated a statewide smokefree air law covering workplaces, restaurants and bars, thus providing policy direction and basic guidelines for local boards. See SLATI (State Legislated Actions on Tobacco Issues) website, <http://slati.lungusa.org>. While Kentucky has no statewide legislation banning smoking, state statutes do not preempt cities and counties from enacting smoking regulations. Approximately ten Kentucky cities and counties have enacted no smoking regulations, but these are ordinances, not boards of health rules. In the cited Kentucky case, the local board of health attempted to enact regulations without county approval, and residents sought an injunction. The circuit court did not rule on the merits of the case but denied the injunction. Thereafter, the elected county commission drafted a similar smokefree ordinance. See Internet news articles regarding smoking laws in Kentucky at http://www.associatedcontent.com/article/170225/smoking_laws_in_kentucky; <http://www.isurfhopkins.com/local-news/1786-hopkins-county-fiscal-courts-approves-1st-reading-of-smoking-ban-ordinance.html>. Another case that the Court has identified that concerns a rule by a local board of health is *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*, 773 N.E.2d 536 (Ohio, 2002). In that case, the Ohio Supreme Court found that the authority granted to local health boards by the legislature was to make rules for the

II. Non-delegation or Separation of Powers Doctrine in the Wyoming Constitution

Summary: It is a basic principle of constitutional law that the creation of a new criminal offense is a legislative act. It is impermissible for an administrative agency to create a criminal offense in the absence of an explicit legislative standard. The Smokefree Air Rule violates that principle of law.

23. Wyoming Constitution, Article 2, Section 1 provides:

The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

This clause has been identified as a "strict" separation-of-powers provision, and thirty-five states have such a provision. *State of Texas v. Rhine*, 297 S.W.3d 301, 315 (Tex. 2009) (Keller, P.J., concurring). In contrast, the U.S. Constitution contains no express separation-of-powers provision. Separation of powers is implied through the federal constitution's structure, dividing the government into three branches and vesting each branch with legislative, executive or judicial power. *Id.* at 314. The Texas Supreme Court has explained that the separation of powers provision can be violated when one branch of government assumes, or is delegated, a power which is more properly attached to another branch.⁹ *Id.* at 305.

24. The Wyoming Supreme Court has acknowledged this strict separation with respect to the legislative and judicial branches in *Hopkinson v. State* as follows: "This court has approved the proposition that the power to determine what acts are crimes, and the punishment for prohibited acts belongs to the legislative branch as an absolute, exclusive and inherent power not shared with the courts." 664 P.2d 43, 50 (Wyo. 1983). Regarding separation of powers between the legislative and executive branches,

[i]n several cases this court has determined that a delegation of authority to an administrative agency was unconstitutional. . . . The thrust of these cases is that explicit legislative standards are required when an individual is deprived of a liberty or property interest. Express constitutional legislative power cannot be delegated in such instances.

Wyoming Coalition v. Wyoming Game & Fish Commission, 875 P.2d 729, 732 (Wyo. 1994). In other cases where the Wyoming Supreme Court found the delegation of authority to an administrative agency was constitutional, the court noted that "a legislature must define standards in as reasonably precise a fashion as the subject matter

implementation of existing standards, not substantive regulatory authority. Thus local boards were allowed to adopt regulations relating to areas of public health where the state power had been delegated, but they were not allowed to act in areas of public health without prior legislative approval. *See also*, 105 A.L.R.5th 333 regarding the validity, construction, and operation of municipal ordinances proscribing or restricting smoking in restaurants.

⁹ In the realm of non-smoking ordinances, the Court acknowledges two New York cases where courts have found the ordinances to be in violation of their constitution's separation of powers provision. In the federal district of New York, the court invalidated a municipal smoking ordinance which was more restrictive than the state's public health law in that it excluded minors from any public indoor smoking area in the county. The court found that the rule violated the separation of powers under state law because the regulation concerned a subject on which the county legislature had tried and failed to reach agreement after substantial public debate. *Leonard v. Dutchess County Dept. of Health*, 105 F.Supp.2d 258 (S.D. N.Y. 2000). In a second case, the court rejected municipal smoking regulations based on the nondelegation doctrine when a county health department promulgated the rules after the county legislature had debated them but declined to enact them. The court held that the department went beyond interstitial rulemaking and engaged in legislating. *Justiana v. Niagara County Dept. of Health*, 45 F.Supp.2d 236 (W.D. N.Y. 1999).

permits. The will of the legislature must be clear The agency is not permitted to follow its own course in articulating rules." *Id.* at 733. A rule may be justified by "sufficiently identifiable general standards together with procedural safeguards that inhibit any unlawful, arbitrary, or capricious rulemaking." *Id.* at 734.

25. In 1935, in an analysis that still holds relevance today, the Wyoming Supreme Court outlined the limits within which rules and regulations of an administrative board may be properly made:

Obviously they cannot pass without the boundaries indicated by the legislative act, and each case will in a large measure have to be adjudged according to its own facts. We are not unaware that some courts have kept in mind chiefly the ever insistent claim that the modern needs of efficient government compel increasing delegation of details to administrative bodies. These courts have gone far in their support of delegation of legislative authority. When such 'details' go to the extent of prescribing the standard of conduct whereby a citizen of the state may be adjudged a criminal and deprived of his liberty, it is our view that the time has arrived to keep in mind also the great fundamental principles in American government prescribing separation of executive and legislative powers.

State v. Grimshaw, 53 P.2d 13, 19 (Wyo. 1935).

26. In Texas, where the state constitution also contains a strict separation of powers clause, the supreme court requires that "when validly delegating authority [to an administrative agency], the legislature must declare a policy and fix a primary standard." *State of Texas v. Rhine*, 297 S.W.3d 301, 310 (Tex. 2009). The Wyoming Supreme Court has similarly concluded that "[t]he crucial test in determining whether there is an unlawful delegation is whether the statute contains sufficient standards to enable the agency to act and the courts to determine whether the agency is carrying out the legislature's intent." *Newport International University, Inc. v. State of Wyoming, Dept. of Education*, 2008 WY 72, ¶ 31, 186 P.3d 382, 390 (Wyo. 2008).
27. In light of the admonitions above, the Court is particularly concerned that the Smokefree Air Rule creates a standard of conduct, the violation of which imposes substantial criminal penalties on violators, including jail for up to one year. Chapter 10 of the Rule provides the following:

A person who smokes in an area where smoking is prohibited by the provisions of this Rule shall be guilty of a misdemeanor as provided in W.S. 35-1-106. . . . A person who owns, manages, operates, or otherwise controls a public place or place of employment and who fails to comply with the provisions of this Rule shall be guilty of a misdemeanor as provided in W.S. 35-1-106. . . . Each day on which a violation of this rule occurs shall be considered a separate and distinct violation.

Wyo. Stat. § 35-1-106 requires that:

Any person who shall violate any of the provisions of this act, or any lawful rule or regulation made by the state department of health pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by any state, county or municipal health officer pursuant to the authority granted in this act shall be deemed guilty of misdemeanor, and shall be punished except as otherwise provided therein by a fine of not more than one thousand dollars (\$1,000.00), or by imprisonment for not more than one (1) year or by both such fine and imprisonment.

28. Although criminal penalties can lawfully be assessed upon violation of the rules of the State Department of Health, the Court again observes that the Governor would have previously approved any such rule pursuant to Wyo. Stat. § 16-3-103(d). But here, in the case of the Smokefree Air Rule, a local, unelected board is, in effect, legislating a new criminal offense in the absence of an explicit standard from either the State Department of Health or the Wyoming Legislature, and it does so with no oversight from any elected official or body. This impermissibly circumvents the legislative process, and it precludes public participation and the checks and balances inherent in the legislative process.
29. An example may serve to illustrate the concerns raised by an unelected agency board "prescribing the standard of conduct whereby a citizen of the state may be adjudged a criminal and deprived of his liberty." *Grimshaw*, 53 P.2d at 19. Under the Smokefree Air Rule, a citizen walking down the Jackson boardwalk, smoking his or her once-a-year birthday cigar in celebration with friends, approaching within twenty feet of a doorway or operable window or air intake vent to a business, can be arrested, charged with a criminal offense and, if convicted, face jail penalties and, at a minimum end up with a criminal record. "If the paramount necessity exists to denounce acts done every day by innocent citizens as criminal offenses, that necessity should be expressly declared by the legislature . . ." *Id.* at 18 (quoting *State v. Retowski*, 175 A. 325, 327 (Del.Gen.Sess. 1934)).
30. It is clear to this Court that there has been no valid delegation of authority from the Wyoming Legislature to the District Board of Health for promulgating the 2009 Smokefree Air Rule with criminal penalties. The legislature has neither declared a policy nor fixed a primary standard regarding smoking in public places in spite of numerous attempts to introduce such legislation. Neither has the State Department of Health attempted to provide guidelines regarding smoking in the interest of public health or disease prevention, which could be implemented locally and even made more restrictive by a local health district. Thus, the Court finds that in enacting the Smokefree Air Rule, and, in particular, defining illegal conduct and imposing criminal penalties for violators, the District Board of Health has crossed the line into the legislative realm and has thereby violated the separation of powers provision of the Wyoming Constitution.
31. The Court can only imagine that the individuals on the board who created the Smokefree Air Rule were motivated by legitimate public health concerns. However well intentioned and beneficial the regulation may be, the Court nevertheless cannot extend the authority of the District Board of Health beyond clearly stated and well-defined limits within the law and the constitution. To do so in this matter would require that it embrace policies and objectives not specifically designated by the Wyoming Legislature or the State Department of Health. Until the Wyoming Legislature chooses to enact legislation clearly enabling rulemaking regarding smoking at the local administrative level, or the State Department of Health lawfully enacts rules that fix a primary standard of conduct in the regulation of secondhand smoke, the District Board of Health is powerless to enact a rule such as the Smokefree Air Rule.
32. This decision does not purport to rule on anything but the situation before it, that is, the authority of a non-elected district board of health to enact this type of regulation.

In summary, the Court finds the Smokefree Air Rule void on two grounds. In the first instance, the District Board of Health has exceeded the rulemaking authority granted to a district board of health in Wyo. Stat. § 35-1-303(a) by enacting rules beyond the scope of an area regulated by the State Department of Health and without clear direction from the Wyoming Legislature. In any event, the enactment of a rule that creates a new criminal offense in the absence of appropriate authority is a legislative act and in clear violation of the Wyoming Constitution, Article 2, Section 1.

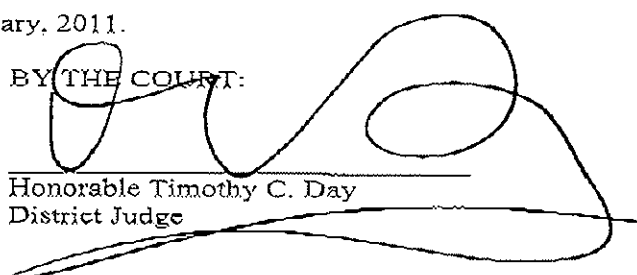
THE COURT HEREBY DECLARES that the Teton District Smokefree Air Rule of 2009 is void and unenforceable because the Teton District Board of Health has exceeded its

rulemaking authority pursuant to Wyoming Statutes and has violated the separation of powers provision in the Wyoming Constitution.

Further, IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is granted.

Dated this 9th day of February, 2011.

BY THE COURT:



Honorable Timothy C. Day
District Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 9 day of Feb 20 11.

S. Freudenthal
A. Hens
B. Ginzary
N. Klueger
By W. Harder