

IN THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

JTR COLEBROOK, INC.)
d/b/a THE COLEBROOK HOUSE) 2003 TERM
v.) APRIL SESSION
TOWN OF COLEBROOK) DOCKET NO. 2003-0085
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)
_____)

MOTION OF AMICI CURIAE TO SUBMIT AMICI CURIAE BRIEF

American Heart Association
American Lung Association of New Hampshire
American Cancer Society
New Hampshire Medical Society
New Hampshire Public Health Association
Smoke-Free New Hampshire Alliance
Tobacco Control Resource Center, Inc.

By their attorneys
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STATEMENT OF INTEREST

Pursuant to Rule 30 of the Supreme Court of New Hampshire, the proposed Amici ask leave of the court to file an amici curiae brief in the above captioned case, *The Colebrook House v. Town of Colebrook*. The Amici provide the following statement of interest in this case and discuss how the Amici may offer additional perspectives on the issues before the Court.

The American Heart Association is the nation's leading organization advocating for public policies designed to reduce disability and death from heart disease and stroke. The effects on the cardiovascular system resulting from direct smoking have long been established. However, it must be noted that an ever-increasing body of evidence is demonstrating the damage to the cardiovascular system affects those passively exposed to tobacco smoke as well as smokers.

The American Lung Association of New Hampshire's (ALANH) mission is to improve lung health in the State of New Hampshire. ALANH has extensive background in the medical conditions related to the lung and the effect of ETS on lung related disease. ALANH recognizes that exposure to ETS exacerbates conditions such as asthma, bronchitis and emphysema.

Amicus American Cancer Society (ACS) is a nonprofit public health organization with a membership of over 2.3 million volunteers throughout the country, including over 50,000 physicians. ACS is committed to the mission of controlling and eliminating cancer through research, education, advocacy and service. Research conducted and supported by ACS since the 1950s has played a pivotal role in identifying the use of tobacco products as the most preventable cause of cancer. ACS has extensive research

experience regarding whether ETS presents a safety concern for the citizens of New Hampshire.

The New Hampshire Medical Society's mission, since its formation in 1791, has been to promote the art and science of medicine and the betterment of public health. It has developed numerous resolutions on a variety of health related issues including the issues of smoking and the dangers of second hand smoke. The Society recognizes that tobacco is the single most important cause of chronic disease and premature death. It strongly supports the right of all citizens to breath clean air that is not contaminated by environmental tobacco smoke.

The New Hampshire Public Health Association is an affiliate of the American Public Health Association, the nation's oldest and largest public health organization. The New Hampshire Public Health Association has been operating since 1991. It is dedicated to promoting and improving the health and wellness of the people of New Hampshire. It has developed numerous policy statements on a variety of significant public health issues including the issues of smoking and the dangers of second hand smoke. The Association recognizes that tobacco use is the single most important cause of chronic disease and premature death. It strongly supports the right of all citizens to breath clean air that is not contaminated by ETS.

The Tobacco Control Resource Center, Inc. (TCRC) provides policy guidance and educational, technical, and legal education to municipalities that have identified the danger posed by tobacco products and the smoke they generate and wish to reduce their harmful impact on their communities. The Smoke-Free New Hampshire Alliance (SFNHA) advocates for policies that support and advance tobacco control and prevention

with the intention of reducing tobacco use, the leading cause of preventable death and disease in New Hampshire, and reducing the public's exposure to ETS.

Amici have serious concerns about the harmful effects of ETS. ETS is now recognized as the third leading preventable cause of death in the United States, after active smoking and consumption of alcohol. See S A Glantz & WW Parmley, *Passive Smoking and Heart Disease*, *Circulation* 83(1):1-12 (1991(a)). ETS contains the same carcinogenic compounds as the smoke inhaled by smokers. See Cal. EPA, *Health Effects of Exposure to Environmental Tobacco Smoke*, (1997); US Department of Health and Human Services, *Report of the Surgeon General: The Health Consequences of Involuntary Smoking*, (1986). The Public Health Service's National Toxicology Program lists ETS as a known carcinogen. See U.S. Department of Health and Human Services, *Public Health Service's National Toxicology Program, Ninth Report on Carcinogens*, (2000). As a known carcinogen, there is no known safe level of exposure. See *id.* ETS exposure has also been found to be causally linked to respiratory illnesses, childhood asthma, lower respiratory tract infections and cardiovascular disease. See Cal. EPA.

ETS is also an important cause of heart disease. Non-smokers exposed to environmental smoke have an increased risk of coronary heart disease.¹ The American Heart Association estimates that the risk of death from coronary heart disease increases by up to thirty percent among non-smokers exposed to tobacco smoke at home or work.² Additional research published in the Journal of the American Medical Association

¹ Jiang He, M.D., Ph.D., et al., *Passive Smoking and the Risk of Coronary Heart Disease - a Meta-Analysis of Epidemiologic Studies*, 340 *New Eng. J. Med.* 920 (March 25, 1999).

² Biostatistical Fact Sheet -- Risk Factors: Tobacco Smoke, *supra* note 4.

indicates that passive smoking substantially reduces coronary flow velocity reserve in health young adults³

The Amici have an interest in this case because the Petitioner aims to prevent the Town of Colebrook from implementing an important public health regulation to protect members of its community from exposure to ETS. Furthermore, Amici have an interest in this case because of the broader implications litigation could have on the regulatory authority of New Hampshire towns in general as regards regulation of ETS. The Amici will endeavor to provide the court with a perspective of how legislative grants of authority to local towns and governments to provide for general safety include the authority for the town to regulate ETS as a public safety measure. At the center of this case is a municipal ordinance that deals directly with the issue of ETS and the health and well being of people who work at and patronize restaurants, as well as the authority of a locality to protect its citizens from ETS. Because of the importance of tobacco control and ETS reduction to the Amici's missions, the proposed Amici have specialized knowledge and experience in this important area, and the participation as Amici will be of assistance to the Court in rendering its decision. The proposed Amici accordingly submit the within brief in support of the previous Superior Court decision.

Therefore, Amici Curiae request the Court permit the Amici Curiae to file the attached brief in this case.

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JAMA. 2001; 286:436-441

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to New Hampshire Supreme Court Rule 30 the undersigned certifies that the original and 7 (seven) copies of this motion have been hand-delivered on May 19, 2003 to the Clerk of the Supreme Court of New Hampshire.

Pursuant to New Hampshire Supreme Court Rule 16(1) the undersigned certifies that on May 19, 2003 one copy of this motion was sent via first class mail to Timothy Bates, Esq., 25 Beacon Street, E. Laconia, NH 03246, and to James Q. Shirley, Esq., 1000 Elm Street, P.O. Box 3701, Manchester, NH 03105-3701.

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QUESTION PRESENTED

1. Whether the Town of Colebrook regulation prohibiting smoking in all food service establishments is preempted by the “New Hampshire Indoor Smoking Act” despite specific anti-preemption language contained in Section 77 of that Act specifically permitting additional municipal prohibitions on smoking to preserve public safety.

SUMMARY OF ARGUMENT

The trial court correctly denied the complaint of the petitioner Colebrook House in upholding the Town of Colebrook municipal regulation implementing a ban on smoking in restaurants. A ruling by a court invalidating a municipal regulation is not to be done lightly. A municipal regulation is presumed to be valid, and the burden lies with the plaintiff to prove its invalidity. The Petitioner has failed to meet this burden.

The trial court correctly held that the municipal regulation was not preempted by state anti-smoking legislation. The municipal regulation is not inconsistent with and is not preempted by New Hampshire's "Indoor Smoking Act" (RSA 155:64-155:77). This Act merely establishes minimum standards for smoking restrictions in indoor public and semi-public areas; the Act expressly allows for more stringent prohibitions on smoking by municipalities in Section 77 of the Act which states "nothing in this subdivision shall be construed to permit smoking where smoking is prohibited by any other provision of law or rule relative to fire protection, safety or sanitation." When the legislature enacted the Indoor Smoking Act, it was careful to include an anti-preemption clause. The legislature clearly indicated its intent not to preempt local law with this provision. The municipal regulation cannot be said to be repugnant to state law when compliance with the municipal regulation necessarily includes compliance with State law. In examining whether a local law is inconsistent with state law, cities and towns are given considerable latitude, requiring a sharp conflict before a local law is invalidated. No such conflict exists in the Colebrook regulation prohibiting smoking in restaurants.

Regulation of ETS is an important safety concern that falls within the anti-preemption section of the Act. The United States Surgeon General, the Center for Disease Control and Prevention, the World Health Organization and independent scientists agree that ETS is a danger to public health. Under Section 77 of the Act, local officials are not prevented from prohibiting smoking as it relates to public safety. Based on current scientific evidence supported by all mainstream public and private health scientists, the local ordinance furthers public safety and therefore fits comfortably within the anti-preemption provision.

The trial court correctly held that the municipal regulation as promulgated by the Town of Colebrook health officers was implemented in accordance with New Hampshire law, and is not preempted by the state licensing scheme. RSA 147, establishing a basic framework for state licensing of restaurants, expressly and specifically permits “the health officers of towns” to “make regulations relative to the ... health conditions for issuing a license to restaurants or other food service establishments operating within the town limits...” Furthermore, the intent of the legislature to allow such regulation by municipalities is expressly stated again in this section, where “food service establishments... licensed by town health officers” are “exempt” from the state licensure scheme. See RSA 143A, Section 5. Because this law specifically allows town health officers to establish licensure of restaurants, it cannot be said that this state statute preempts a municipality from implementing licensing regulations. The Colebrook municipal ordinance cannot be said to be “repugnant” to this state licensing law as conformity with the municipal ordinance and licensing scheme falls within the exception

enumerated in the state law. The appellant has failed to prove that the ordinance does not fall within the exception and the trial court correctly held as such.

ARGUMENT

1. The trial court correctly denied the relief of the Petitioner in upholding the Town of Colebrook municipal regulation implementing a ban on smoking in restaurants.

“The burden of proving the invalidity of an ordinance lies with the party attacking its validity.” North Hampton v. Sanderson, 131 N.H. 614 (1989) (quoting Alexander v. Town of Hampstead, 129 N.H. 278 (1987)). “When a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly overturned.” Town of Nottingham v. Harvey, 120 N.H. 889 (1980). The trial court held that the plaintiff has not met this burden of proof because the petitioner has not submitted evidence that the municipal ordinance was inconsistent with state law.

- A. The “Environmental Tobacco Smoke Regulations for Restaurants” municipal regulation is not preempted by the state tobacco regulation scheme because the state law specifically includes anti-preemption language.

“Towns cannot regulate a field that has been preempted by the state.” Town of Hooksett v. Baines, 148 N.H. 625 (2002). “The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law.” Casico v. City of Manchester, 142 N.H. 312 (1997). Further, “that the State has created a comprehensive statutory scheme does not automatically result in preemption, however, because it could nonetheless authorize additional municipal regulation.” Casico, 142 N.H. at 315.

In examining whether a local law is inconsistent with state law, “preemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme.” Town of Hooksett v. Baines, 148 N.H. at 627. The Colebrook municipal ordinance is not inconsistent with and is not preempted by the New Hampshire Indoor Smoking Act, RSA 155:64-155:77 because Section 77 of that Act specifically states that municipal regulations are not preempted. In the plain language of the statute the legislature contemplated that municipalities could further restrict smoking in their communities without being preempted by the Act.

When the Legislature enacted New Hampshire’s Indoor Smoking Act, it was careful to include an anti-preemption clause in the event municipalities enacted regulations restricting smoking on safety grounds. RSA 155:77 states: “Nothing in this subdivision shall be construed to permit smoking **where smoking is prohibited** by any **other provision of law or rule** relative to fire protection, **safety** or sanitation.” (emphasis added).

Basic principles of statutory construction instruct us that words in a statute should be given their ordinary and plain meaning. Town of Pelham v. Browning Ferris Industries, Inc., 141 N.H. 345 (1996). The language of Section 77 makes it clear that the Legislature did not intend to preclude local action on the subject of smoking, but rather intended to establish minimum smoking provisions. Section 77 would be rendered meaningless if the Act were found to preempt “other provisions of law or rule” related to smoking and safety. The Colebrook regulation is precisely the type of law envisioned by the anti-preemption clause: a provision or rule relative to safety that was legally enacted

by the town under authority granted to it by the Legislature and that is to be implemented under statutory authority granted to the local health officer to preserve safety (See RSA 147:1, II, enabling town health officers to make regulations relative to safety in restaurants, see *infra*).

Petitioner's argument boils down to the inverse of Section 77: The state's "comprehensive scheme" should be interpreted to permit smoking where local authorities chose to prohibit it for safety reasons. Petitioner asks the Court to ignore the expressly stated intent of the legislature set forth in the section of the Act that directly addresses the issue of preemption. The plain meaning of Section 77 directly contradicts petitioner's argument.

Where the Court has found the detailed statutory scheme to be preemptive the statutes in those cases have not included an anti-preemption provision. See Town of Pelham v. Browning Ferris Industries of New Hampshire, Inc., 141 N.H. 355 (1996) (implied preemption found where the comprehensive state scheme to regulate closure of landfills addressed the same subject as the local ordinance), and Arthur Whitcomb v. Town of Carroll, 141 N.H. 402 (1996) (implied preemption found where comprehensive state scheme to regulate blasting operations invalidated local zoning laws as applied to blasting operations within the town). In those cases the Court had to imply preemption because the legislature had not specifically addressed the issue as in the current statute. Here, the legislature maintained the ability of towns to regulate indoor smoking as a safety issue. Previous and subsequent legislative grants of authority to municipalities to preserve safety from ETS in public places are therefore unaffected by the statute. Although the current statute presents a certain level of detail in its restrictions on ETS, it

would be odd to find that the legislature impliedly preempted the field when it expressly stated that it anticipated and would not preempt local regulations based on safety.

Even reviewing this case to determine whether the legislature impliedly preempted municipalities from regulating indoor smoking, the regulation should be upheld. In Casico the court held that merely because the state law is comprehensive does not automatically result in preemption because the legislation may permit additional municipal regulation. Casico, 142 N.H. at 316. When the state legislation contemplates limited municipal involvement, a preemption conclusion is bolstered. In Arthur Whitcomb, though, the state statutory language expressly limited the scope of municipal involvement, whereas Section 77 of the Indoor Smoking Act expresses relatively broad applicability of municipal laws. This implies that, far from contemplating limited municipal involvement, the legislature intended for broad municipal involvement. Additionally, the municipal ordinance in Casico, 142 N.H. at 317, had the potential to nullify the authority granted to a holder of a state permit to engage in liquor sales. Under the Colebrook ordinance, compliance with the local ordinance necessarily requires compliance with the state statute. Colebrook's ordinance is not preempted because the legislature as part of its statutory scheme anticipated and specifically allowed municipalities to enact more stringent smoking regulations.

- B. The “Environmental Tobacco Smoke Regulations for Restaurants” municipal ordinance is a rule relative to safety, and as such the state Legislature has specifically permitted the Town of Colebrook to enact it.

The Colebrook ordinance falls within the statutory allowance of the state Indoor Smoking Act as a “provision of law or rule relative to fire protection, safety and sanitation.” RSA 155:77. The ordinance is a “provision of law” enacted by the Town of Colebrook under authority delegated to it by the state Legislature. RSA 31:39. Voters approved a ballot initiative that effectively banned smoking in restaurants.

Municipal health officers are expressly granted the authority to promulgate regulations relative to health and safety under RSA 147:1 *et.seq.* That statute states “[t]he health officers of towns may make regulations for the prevention and removal of nuisances, and such other regulations relating to the public health as in their judgment the health and safety of the people require . . . The health officers of towns may make regulations relative to the sanitary and health conditions for issuing a license to restaurants or other food serving establishments operating within the town limits.”

Colebrook’s town health officer, acting under the authority delegated to him under RSA 147:1 and in conformity with the voter-approved petition, promulgated regulations requiring that restaurants in the town become smoke-free. This municipal ordinance is an “other provision of law or rule” that the Legislature specifically included in the Indoor Smoking Act to allow further smoking regulation by municipalities. RSA 155:77. The anti-preemption provision encompasses three broad areas: fire protection, safety, and sanitation. *Id.* “Safety” must mean something other than fire protection and sanitation to avoid attributing redundant language to the legislature.

That a smoking ban constitutes a rule relative to safety is a question well-settled by academics, scientists, physicians, and government agencies at all levels, and therefore the town health officer has the authority to regulate it. *See* RSA 147:1 *et. seq.*

Environmental tobacco smoke (“ETS”) is a combination of smoke from the lit end of a cigarette and smoke exhaled by the smoker. See, Cal. EPA, Health Effect of Exposure to Environmental Tobacco Smoke, (1997). It contains the same carcinogenic compounds and chemicals as smoke inhaled by the smoker. See, id. There exists a vast body of scientific research on the negative effects of ETS. See, Cal EPA, supra; see also U.S. Department of Health and Human Services, Report of the Surgeon General: The Health Consequences of Involuntary Smoking, (1986).

ETS contains over 4000 chemicals, some of which have marked irritant properties and at least 60 are known or suspected carcinogens (cancer causing substances). See US Dept. of Health and Human Services, Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General. (1989). In New Hampshire alone, smoking cigarettes kills more people than alcohol, HIV, car crashes, illegal drugs, murders, and suicides combined. 1,600 New Hampshire residents die each year from smoking; 180 to 320 more state residents die each year from ETS. See U.S. Centers for Disease Control and Prevention (CDC), State Highlights 2002, Impact and Opportunity (2002).

Like asbestos, as a known human carcinogen there is no known safe level of exposure. See, U.S. Department of Health and Human Services, *supra*. ETS has also been found to be causally related to respiratory illnesses, childhood asthma, lower respiratory tract infections and cardiovascular disease. See, Cal. EPA, *supra*.

The medical community, the US Surgeon General, and public health authorities are in agreement: smoking is a threat to the health and safety of not only the smoker but

to bystanders as well. As such, the health officer of the Town of Colebrook is acting under his statutory authority when regulating smoking as it relates to safety.

The statutory scheme in the instant case anticipated that municipalities would pass local tobacco control ordinances and specifically included anti-preemption language. To preempt the Colebrook ordinance would be contrary to the legislature's scheme of providing the baseline for smoke-free ordinances. This is not surprising because studies show that local enforcement of tobacco control laws are the most effective method of regulating tobacco use. Jacobsen, Peter D., and Wasserman, Jeffrey, *Tobacco Control Laws: Implementation and Enforcement* (Rand 1997) at 94. The town acted under its authority to preserve public safety in accordance with RSA 147 and the state statute did not preempt the municipal ordinance because the legislature specifically provided an anti-preemption provision for public safety as part of the state statutory scheme.

Conclusion

Therefore, Amici Curiae request the Court find that the Indoor Smoking Act does not preempt local authority to regulate smoking to preserve the public safety and affirm the Superior Court's decision upholding the Town of Colebrook's ordinance.

Respectfully submitted,

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