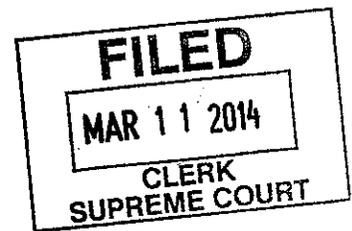


SUPREME COURT OF KENTUCKY  
2013-SC-000023-D



BULLITT FISCAL COURT,  
BULLITT COUNTY, KENTUCKY  
CITY OF MT. WASHINGTON  
CITY OF SHEPHERDSVILLE  
CITY OF HILLVIEW  
CITY OF LEBANON JUNCTION  
CITY OF PIONEER VILLAGE  
CITY OF HEBRON ESTATES  
CITY OF HUNTER'S HOLLOW AND  
CITY OF FOX CHASE

APPELLANTS

V.

**REPLY BRIEF**

BULLITT COUNTY BOARD OF HEALTH

APPELLEE

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APPEAL FROM BULLITT CIRCUIT COURT, NO. 11-CI-00348  
HON. RODNEY BURRESS, BULLITT CIRCUIT JUDGE, DIVISION ONE  
AND ON DISCRETIONARY REVIEW FROM  
THE KENTUCKY COURT OF APPEALS, NO. 2011-CA001798

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Hon. Monica Meredith Robinson  
Hon. John E. Spainhour  
Hon. Tammy Baker  
BULLITT COUNTY ATTORNEY'S OFFICE  
300 SOUTH BUCKMAN STREET  
P.O. BOX 1446  
SHEPHERDSVILLE, KY 40165  
Phone: (502) 543-1505; Fax: (502) 921-4538  
COUNSEL FOR APPELLANTS

**CERTIFICATE REQUIRED BY CR 76.12(6)**

The undersigned hereby certifies that copies of this Brief were served by first-class mail, postage prepaid, on this 7<sup>th</sup> day of March, 2014, to: Hon. Rodney Burress, Bullitt Circuit Judge, Division One, P.O. Box 97, Shepherdsville, KY 40165, Trial Judge; Hon. Philip D. Scott, Hon. Jason T. Ams, and Hon. Margaret A. Miller, Bingham Greenebaum Doll, LLP, 200 West Vine Street, Suite 1100, Lexington, KY 40507, Attorneys for Respondent; and to Hon. Jack Conway, Kentucky Attorney General, State Capitol, 700 Capitol Avenue, Suite 34, Frankfort, KY, 40601.

  
COUNSEL FOR APPELLANTS

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INTERPRETING ITS POWERS

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May it please the Court<sup>1</sup>:

Argument

I. **The Board of Health's reliance on KRS 212.230 is not supported by the Kentucky case law interpreting its powers.**

The Board of Health asserts that KRS 212.230 authorizes the smoking regulation it promulgated. It supports its arguments citing *Louisville & Jefferson Cnty. Bd. Of Health v. Haunz*, 451 S.W.2d 407 (1970) and *Barnes v. Jacobsen*, 417 S.W.2d 224 (Ky. 1967).

*Haunz* dealt with a sanitary code passed in an effort to prevent landlords from renting substandard apartments and required homeowners to provide water, sanitary fixtures, and sewage disposal and regulating the lighting, ventilation, maintenance, and occupancy of places rented as dwellings. The power to regulate sanitation is specifically granted by the legislature. The low-income families that are protected from landlords by this regulation do not often have a choice about the living arrangements they can afford or the minimum standard applicable to them. Bullitt County citizens, by contrast, may choose the restaurants and other public areas they frequent. Additionally, the Board of Health is specifically empowered to regulate solid waste proposals.

In *Barnes*, the issue was whether the Board of Health had the authority to require a permit to be obtained prior to the installation of a private sewage system. The authority to promulgate and administer administrative regulations in regard to solid waste planning

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The issue of the effect, if any, of Bullitt County Ordinance No. 13-32, adopted on December 17, 2013, and included into this record by Order of this Court on February 18, 2014, is not addressed in this Reply Brief. To do so would raise an issue not addressed in the Appellee Brief in violation of CR 76.12(4)(e); and would violate the spirit, if not the letter, of this Court's Order of February 18, 2014.

and management was specifically granted pursuant to KRS 224.43-340.

In each instance, the General Assembly had made a specific grant of authority to regulate. As the Court in *Haunz* stated,

“We are of the opinion that the regulations contained in the sanitary code are valid and are reasonably necessary to protect the health and welfare of the inhabitants of Jefferson County; that the regulations were *adopted pursuant to enabling legislation*”. (emphasis added) *Louisville & Jefferson Cnty. Bd. Of Health v. Haunz*, 451 S.W.2d 407 (1970) at page 409.

The Barnes Court stated:

“We hold that such delegation on police power is not contrary to law... matters of sewage disposal are subject to police power of the state. This concept is so firmly established that it is no longer open to question.” *Barnes v. Jacobsen*, 417 S.W.2d 224 (Ky. 1967) at page 227.

**II. The Board of Health urges an interpretation of KRS 212.230 that does violate the Kentucky Constitution.**

The Board of Health argues that KRS 212.230 as a basis to enact the smoking ban regulation does not unconstitutionally usurp the authority of county legislative bodies. The Board cites *So. Displays, Inc. v. Ward*, 414 S.W.2d 573 (Ky. 1967); *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352.S.W.2d 203 (Ky 1961); and *Commonwealth v. Do, Inc.*, 674 S.W.2d 519 (Ky. 1984) in support of its argument. Each case is distinguishable.

*So. Displays* dealt with regulations promulgated by the Department of Highways. In that case, the Kentucky General Assembly had specifically delegated authority to the Department of Highways to regulate billboard advertisement. The statute specifically enumerated the types of advertising that the Department may regulate. KRS 177.860. The General Assembly had enacted a primary rule and delegated to the Department of

Highways the task of implementing that rule with reasonable standards.

In *Butler*, the issue was whether the legislature could delegate to the state Board of Education the authority to approve private learning institutions to receive public funds when a lack of programs at public school leads special needs children to attend those private schools. This Court held such action was an authorized delegation. Again the General Assembly by statute established that private schools providing instruction to special needs children could receive public assistance if the public schools in the same district at the private school were not offering like instruction. KRS 157.305. That statute delegates the technical aspect of implementation to the Board of Education. The grant is specific and contemplates regulation in the area delegated.

*Do* involved sanitary code violations of lead-based paint regulations. Again, KRS 211.901(4) expressly authorized the state Cabinet to provide financial and technical assistance to establish and maintain local programs in regard to lead poisoning prevention.

Nowhere in the Kentucky statutes is there a similar delegation regarding smoking.

**III. The provisions of KRS 212.230 are not an inherent and exclusive legislative authority to regulate matters of public health.**

The grant to regulate anything that the Board of Health determines is “in furtherance of protection of the public health” is an over-broad exercise of its powers. When the Board advises “we won’t regulate cheeseburgers and soda,” it is noteworthy that the Board doesn’t say it cannot; it simply says it will not. The limitation that the Board of Health seeks to distinguish this fact is specious. Certainly the Board of Health cannot regulate the consumption of cheeseburgers or soda in private homes. But the same rationale it utilizes to empower the enactment of smoking regulations would also empower limitations on cheeseburgers or sodas or firearms in public places.

**IV. Appellants have not waived their challenge to the promulgation of the Smoking Regulation.**

The issue before this Court is not whether the regulation of smoking is or is not a good idea. The issue is not whether smoking threatens public health. The issue is the power to legislate a limitation on smoking. As previously noted by Judge Taylor in his dissent in the Court of Appeals decision, the cited studies by the Board of Health do not specifically support any finding about the effect of second-hand smoking in Bullitt County. Opinion in Kentucky Court of Appeals No. 2011-CA-001798-MR *Bullitt County Board of Health vs. Bullitt County Fiscal Court, et al*, rendered December 7, 2012, page 15.

Even assuming that smoking is a public health issue, it does not automatically follow that KRS 212.230 empowers the Bullitt County Board of Health to regulate smoking in public places and on private property. The absence of a challenge by the Appellants to the Board's claim of linkage between smoking and health is not a waiver about the authority of the Board to regulate.

**Conclusion**

Bullitt County Board of Health may:

“adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people, or to effectuate the purposes of this chapter or any other law relating to public health.” KRS 212.230

The enabling portion of this grant acknowledges that its actions could be “otherwise provided by law”. The Board of Health is a creature of statute that is established by Fiscal Court, and which may be established absent such ordinance by

election. KRS 212.070, KRS 212.080. Once established, it becomes subject to certification and regulation by the Cabinet for Health and Family Services pursuant to statute. It is a regulatory, not legislative, body. It has specific legislative grants of power. KRS 212.210. None of those grants include a right to regulate smoking.

It is fundamental to our separation of powers in government that rules affecting all of us be promulgated pursuant to powers derived from the government. The right to regulate smoking is a legislative power, not a regulatory one. It is subject to the legislation of fiscal courts. *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004). It is clearly subject to the legislative power of the General Assembly. There is no check at the ballot box against the actions of the Health Department. There is such a check about the actions of the General Assembly or the Fiscal Court. Smoking is a legal activity and its regulation should be left to legislative bodies absent an express grant.

Respectfully Submitted,



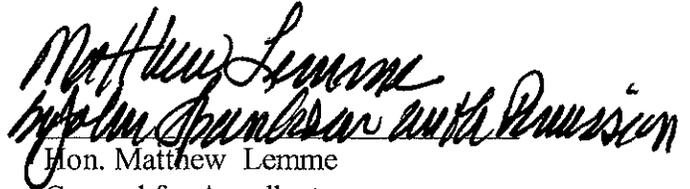
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Hon. John E. Spainhour  
Co-Counsel for Appellant,  
Bullitt Fiscal Court  
300 S. Buckman St.  
P.O. Box 1446  
Shepherdsville, KY 40165  
(502)543-1505



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Hon. Joseph J. Wantland  
Counsel for Appellant,  
City of Shepherdsville, Kentucky  
P.O. Box 515  
Shepherdsville, KY 40165  
(502)543-2840



---

Hon. Matthew Lemme  
Counsel for Appellant,  
City of Mt. Washington, Kentucky  
275 Snapp St.  
P.O. Box 285  
Mt. Washington, KY 40047  
(502)538-7017



---

Hon. Mark Edison  
Counsel for Appellant,  
City of Hillview, Kentucky  
City of Hebron Estates, Kentucky  
City of Fox Chase, Kentucky  
City of Lebanon Junction, Kentucky  
City of Pioneer Village, Kentucky  
City of Hunters Hollow, Kentucky  
178 Combs Court  
Shepherdsville, KY 40165  
(502) 543-5616