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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001798-MR

BULLITT COUNTY
BOARD OF HEALTH — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 11-CI-00348

BULLITT COUNTY FISCAL COURT, BULLITT COUNTY, KENTUCKY; CITY OF MOUNT WASHINGTON, KENTUCKY; CITY OF SHEPHERDSVILLE, KENTUCKY; CITY OF HILLVIEW, KENTUCKY; CITY OF LEBANON JUNCTION, KENTUCKY; CITY OF PIONEER VILLAGE, KENTUCKY; CITY OF HEBRON ESTATES, KENTUCKY; CITY OF HUNTERS HOLLOW, KENTUCKY; AND CITY OF FOX CHASE, KENTUCKY — APPELLEES

OPINION REVERSING
AND REMANDING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Bullitt County Board of Health ("Board of Health") appeals from the September 15, 2011, order of the Bullitt Circuit Court declaring invalid a regulation promulgated by the Board of Health that sought to prohibit smoking in certain places within Bullitt County. For the following reasons, we reverse and remand.

On March 22, 2011, the Board of Health adopted Regulation No. 10-01, entitled "A Regulation Related to the Protection of the Public Health and Welfare by Regulating Smoking in Public Places and Places of Employment" ("Regulation"). The Regulation generally prohibited smoking in public places, places of employment, private clubs, and at some outdoor events in Bullitt County.

The Bullitt County Fiscal Court, Bullitt County, Kentucky; City of Mount Washington, Kentucky; City of Shepherdsville, Kentucky; City of Hillview, Kentucky; City of Lebanon Junction, Kentucky; City of Pioneer Village, Kentucky; City of Hebron Estates, Kentucky; City of Hunters Hollow, Kentucky; and City of Fox Chase, Kentucky (hereinafter collectively referred to as "Appellees") filed in the Bullitt Circuit Court a petition for declaration of rights claiming that the Regulation was invalid. CR[1] 57; KRS[2] 418.040. By order entered September 15, 2011, the circuit court held the Regulation invalid upon sundry grounds. This appeal followed.[3]

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

[3] By orders entered February 24, 2012, this court permitted Clark County Board of Health, Madison County Board of Health, Woodford County Board of Health, Kentucky League of

The issue before this court concerns the Board of Health's authority to adopt the Regulation. The Board of Health cites to KRS 212.230(1)(c) as the legislative grant authorizing enactment of the Regulation. The interpretation and construction of a statute is an issue of law, and our review proceeds *de novo*. *See Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997).

The Board of Health argues that the circuit court erred by declaring the Regulation invalid. We agree. Resolution of the issues in this case entail a determination of 1) whether the Bullitt County Board of Health has the authority to promulgate regulations or ordinances involving public health, 2) whether exposure to second-hand smoke is a health issue, and 3) whether the adopted ordinances are reasonable. The answer to all questions is "yes," and the circuit court's decision was erroneous.

As to the first issue generally, an administrative agency such as the Board of Health derives its power and authority solely from delegations of power as set forth in statutes enacted by the General Assembly. 4A William A. Bardenwerper, *Kentucky Practice – Methods of Practice* § 19.2 (4th ed. 2011). An administrative agency, as a purely statutory creation, possesses no inherent authority and derives all its rule-making authority from legislative grant. *Brown v. Jefferson County Police Merit Bd.*, 751 S.W.2d 23, 25 (Ky. 1988). *See also Dep't*

Cities, The American Cancer Society, The American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, Campaign for Tobacco-Free Kids, The National Association of County and City Health Officials, The National Association of Local Boards of Health, Foundation for a Healthy Kentucky, Kentucky Health Departments Association, Kentucky Public Health Association, Kentucky Medical Association, and Kentucky Nurses Association to file amicus curiae briefs in this appeal. CR 76.12(7).

for Natural Res. v. Stearns Coal & Lumber Co., 563 S.W.2d 471, 473 (Ky. 1978) (stating that "[i]t is fundamental that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim[]"). Furthermore, an administrative agency may neither assume power nor adopt regulations in the absence of an express statutory enactment. *Lovern v. Brown*, 390 S.W.2d 448, 449 (Ky. 1965). Where reasonable doubt exists concerning the proper scope of an administrative agency's power, the question must be resolved against the agency to limit its power. *Bd. of Educ. of City of Newport v. Scott*, 189 Ky. 225, 227, 224 S.W. 680, 681 (1920).

More specifically to the authority to promulgate regulations or ordinances involving public health, the legislature has clearly granted county boards of health the authority to "[**a]dopt**, 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(1)(c) (emphasis added). In *Commonwealth v. Do, Inc*., 674 S.W.2d 519 (Ky. 1984), the Kentucky Supreme Court stated:

> Pursuant to KRS 212.350 *et seq*., the Louisville and Jefferson County Board of Health has broad authority to promulgate rules and regulations concerning public health. *Louisville & Jefferson County Board of Health v. Haunz,* Ky., 451 S.W.2d 407 (1970).
>
> *Stephenson v. Louisville & Jefferson County Board of Health, et al.,* Ky., 389 S.W.2d 637 (1965), held that the Board of Health was a municipal corporation and

> a subdivision of the state. Consequently, the Board of Health in actions taken pursuant to its own regulations or the laws of other governmental units is actually exercising the police power of the state to protect the public health. The state, through the powers delegated by it to any of its political subdivisions, may require citizens to conform to its properly enacted regulations regarding public health. Such is the case in regard to the enforcement of local lead-poisoning control regulations as they relate to owners of rental property in Jefferson County.
>
> The constitutional objections asserted by Do, Inc., are unconvincing. In *Adams, Inc. v. Louisville & Jefferson County Board of Health,* Ky., 439 S.W.2d 586 (1969), it was held that there is no broader field of police power than that of public health. The constitutional limitation upon the exercise of the police power to regulate health is a matter of reasonableness. We are not convinced that the regulations here are in any way unreasonable. The mere presence of the state in a particular area of the law will not automatically eliminate local authority to regulate. Concurrent local regulation was held valid in *City of Ashland v. Ashland Supply Co.,* 255 Ky. 123, 7 S.W.2d 833 (1928), unless it is unreasonable and oppressive and it conflicts with state legislation.
>
> In *Barnes v. Jacobsen,* Ky., 417 S.W.2d 224 (1967), county boards of health were permitted to adopt regulations not in conflict with the state board of health as an authorized delegation of the police power.

Do, 674 S.W.2d at 521.[4] County boards of health, such as the Bullitt County Board of Health, like the Louisville & Jefferson County Board of Health in *Do*, are state subdivisions and "through the powers delegated by [the legislature] may

[4] In *Do*, the regulation at issue had been promulgated by the Louisville & Jefferson County Board of Health pursuant to KRS 212.600, which gave the local board of health "the duty of the board created in KRS 212.350 to make and enforce all reasonable regulations controlling or affecting the health of citizens and residents of said county[.]"

require citizens to conform to its properly enacted regulations regarding public health." *Id.* Furthermore, public health laws are to be liberally construed. *Sanitation Dist. No. 1 v. Campbell*, 249 S.W.2d 767, 770 (Ky. 1952) (citing *Nourse v. City of Russellville*, 257 Ky. 525, 78 S.W.2d 761 (1935)).

Appellees argue that promulgation of the ordinance by an appointed board violates the Kentucky constitution, specifically the exercise of legislative power by an executive branch body.[5] Under Ky. Const. § 27, the governmental power of the Commonwealth is explicitly divided into three distinct departments: legislative, executive and judicial. Ky. Const. § 28 provides "[n]o person or collection of persons, being of one of those departments [] shall exercise any power properly belonging to either of the others[.]" This issue, however, was resolved in *Do*,[6] and in the extensive discussion of the constitutionality of a board of health's rule-making power in *Louisville & Jefferson County Bd. of Health v. Haunz*, 451 S.W.2d 407 (Ky. 1969). As Kentucky's highest court long ago stated, in *Breckenridge County v. McDonald*, 154 Ky. 721, 159 S.W. 549 (1913),

> "The county boards of health are county officials having duties to perform toward the public within their

[5] Under KRS 212.020(1), the secretary of the Cabinet for Health and Family Services appoints the majority of the members of a county board of health: three physicians, a dentist, a registered nurse, an engineer licensed and practicing either civil or sanitary engineering, an optometrist, a veterinarian, a pharmacist, and a lay person knowledgeable in consumer affairs residing in each county. In addition, the board includes the county judge/executive, and a fiscal court appointee.

[6] The majority opinion in *Do* approved the rule-making power in question by the lengthy quotation set forth hereinabove. 674 S.W.2d at 521. Justice Leibson's dissent in *Do* brings the separation of power issue clearly into focus. 674 S.W.2d at 522-23 (Leibson, J., dissenting). We acknowledge that dissent is compelling, however, the majority decision constitutes the law of the Commonwealth, which we are bound to follow. Ky. Rules of the Supreme Court ("SCR") 1.030(8)(a).

> counties; their compensation is required to be fixed and paid through the fiscal courts of the counties. It was competent for the legislature to create these governmental agencies, and to impose upon them the discharge of certain duties to the State and counties. **If the legislature sees proper to have the police laws of the State looking to the preservation of the health of the public, executed by a body of officials selected and chosen with reference alone to their fitness for that delicate and important task, instead of imposing it on the fiscal courts, or town councils, it is clearly within their power to do so.**"

Id. at 727, 159 S.W. at 552 (emphasis added) (quoting *City of Bardstown v. Nelson County*, 25 Ky.L.Rptr. 1478, 78 S.W. 169 (1904)).

As to the second and third issues, whether the smoking ban in question relates to public health, and whether the regulation in question is reasonable, these issues were answered by the Kentucky Supreme Court in *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004). In that case, the Court stated that "[p]rotecting the public from exposure to environmental tobacco smoke, sometimes known as second-hand smoke, can be the proper object of the police power of local government." *Id*. at 750. As to the reasonableness of the Bullitt ordinances, they are in no meaningful way distinguishable from those approved in *Lexington Fayette County*. The pre-emption issue raised by Appellees in this case was similarly disposed of by *Lexington Fayette County*. *Id*. at 749-52.

The Bullitt Circuit Court's order is reversed, and this matter is remanded to that court for further proceedings consistent with this opinion.

KELLER, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING. Respectfully, I dissent. I agree with the Bullitt Circuit Court that the Bullitt County Board of Health exceeded its administrative authority in enacting a smoking ban (Regulation 10-01) in Bullitt County. The majority agrees with the Board of Health that KRS 212.230(1) permits the Board to enact a county-wide smoking ban in public places, places of employment, private clubs, and other outdoor venues, notwithstanding that neither the fiscal court nor the eight incorporated municipalities in Bullitt County have approved or enacted such a ban. For the reasons stated, I must disagree with the majority on this issue.

As noted by the majority, the Board of Health as an administrative agency, possesses no inherent authority, is purely a creature of statutory creation and derives all rule-making authority from legislative grant. *Brown v. Jefferson County Police Merit Bd.*, 751 S.W.2d 23 (Ky. 1988). An administrative agency may neither assume power nor adopt regulations in the absence of an express statutory enactment. *Lovern v. Brown*, 390 S.W.2d 448 (Ky. 1965). I agree totally with the majority that where reasonable doubt exists concerning the proper scope of an administrative agency's power, the question must be resolved against the agency to limit its power. *Board of Educ. v. Scott*, 189 Ky. 225, 224 S.W. 680 (1920). In this case, there exists substantial doubt regarding the Board of Health's authority to enact a smoking ban in Bullitt County.

As concerns the Board of Health's specific grant of authority, the Board of Health claims that the Regulation was authorized by KRS 212.230(1)(c), which reads:

> 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[.]

Thereunder, the Board of Health specifically points to the language enabling it to adopt administrative regulations "necessary to protect the health of the people." The Board of Health asserts that smoking presents a threat to the health of the citizens of Bullitt County; hence, the Board of Health possesses authority to regulate smoking under KRS 212.230(1)(c) as a threat to public health.

However, I have serious doubt as to the actual relationship of the proposed regulation to the public health conditions that may exist in Bullitt County, given the Board relied exclusively on national and international studies on the adverse health effects of second-hand smoke. For example, in Regulation 10-01, under Section 1 styled "Findings and Intent" there is absolutely no reference to smoking and adverse health effects in Bullitt County – there are no local studies, no county-wide statistics, or any relevant local information cited by the Board of Health to support the Regulation. In other words, the Board of Health made no findings on specific conditions or consequences in Bullitt County regarding smoking and second-hand smoke and its adverse health effects on the residents of Bullitt

County. Rather, the Board of Health cites to several national studies by federal agencies dating back as far as thirteen years before the Bullitt County Regulation was enacted as well as a study by the California Environmental Protection Agency, a hospital myocardial infarction study from Helena, Montana, two studies published in the British Medical Journal, one study by the Nova Scotia Department of Health, and of course, I cannot leave out the report from the American Society of Heating, Refrigerating and Air-Conditioning Engineers. The citizens of Bullitt County, per Kentucky statutes, are mandated to be the sole focus of the Board's regulatory duties and powers. KRS 212.210, KRS 212.230, and KRS 212.240. There is absolutely nothing contained in the boilerplate findings of the Board of Health in the proposed Regulation which indicates they have addressed the second-hand smoke health issue specifically as it relates to the citizens of Bullitt County. For this reason alone, the circuit court was within its authority to enjoin the implementation of the Regulation.

Even if the Board of Health had adequately and thoroughly examined the adverse health effects of second-hand smoke on its citizens in Bullitt County, I believe the Board of Health still exceeded its administrative powers in passing this Regulation. As noted by the circuit court, the powers granted to cities and counties as set out in KRS 61.083, KRS 82.082, and KRS 61.165, individually and collectively reserve to cities and counties the authority to regulate smoking and second-hand smoke in their respective jurisdictions. The circuit court is correct, in my opinion, in concluding that the Board of Health cannot adopt administrative

regulations which conflict with or interfere with cities and counties constitutional and statutory powers, especially in this case where the legislature has not expressly authorized health boards to act. Effectively, the Board of Health is attempting to legislate or enact a law as a nonelected body under the guise of public health which I believe is prohibited under the Kentucky Constitution.

Arguably, rather than file this action, Bullitt County and each of the eight municipalities could have enacted legislation to permit or regulate smoking in public places and overturn the ban imposed by the Board of Health in its entirety. Such legitimate enactments could not be overturned or otherwise set aside by the Board of Health without a constitutional mandate, which does not exist, given that the Board of Health is an entity authorized by the county. KRS 212.040. However, rather than create a legislative - administrative stalement, appellees properly initiated this action to enjoin the Board of Health's infringement on the local governments' constitutional duties and powers. To the extent the cities and county, and their elected officials have failed to address a perceived serious public health issue, the citizens of Bullitt County have an easy method to remedy the problem – the ballot box. Or, in the alternative, the Kentucky General Assembly can expressly authorize health boards to regulate smoking in each county.

Notwithstanding, the most sound legal basis for setting aside the Regulation are the basic rules of statutory interpretation that this Court is duty bound to follow. There is an inherent ambiguity in the language of KRS 212.230(1)(c) "to protect the health of the people" as relied upon by the Board of Health in passage

of the Regulation, in my opinion. When interpreting ambiguous language in statutes, our judicial role is to focus upon the legislative intent at the time KRS 212.230(1)(c) was enacted. *Cosby v. Commonwealth*, 147 S.W.3d 56 (Ky. 2004); *County of Harlan v. Appalachian Reg'l Healthcare, Inc.,* 85 S.W.3d 607 (Ky. 2002); *American Premier Ins. Co. v. McBride*, 159 S.W.3d 342 (Ky. App. 2004).

While this Court, including myself, and contemporary society may view smoking and second-hand smoke today as presenting a potential health threat for our citizens, KRS 212.230(1)(c) was enacted some fifty-eight years ago in 1954. Considering the date of enactment of KRS 212.230(1)(c), I harbor grave doubt that the General Assembly intended to empower health departments at that time with the authority to regulate smoking as a threat to public health under the ambit of KRS 212.230(1)(c). And, certainly in 1954, second-hand smoke was not a known public health issue. There is nothing in the record before this Court that would support that proposition. And since 1954, I can find no legislative enactment that would empower health boards in Kentucky to unilaterally regulate and legislate in this area. As reasonable doubt exists upon whether the Board of Health possesses authority to regulate smoking under KRS 212.230(1)(c), the regulation is invalid on its face.

The majority relied upon *Commonwealth v. Do, Inc.*, 674 S.W.2d 519 (Ky. 1984), in its interpretation and application of KRS 212.230(1)(c). However, that reliance on *Do* is misplaced, in my opinion. In *Do*, the Supreme Court approved a health board's regulatory involvement in the prevention of lead poisoning in

Jefferson County. The General Assembly had enacted a statewide program and policy to address lead poisoning in KRS 211.900, *et seq.* And, as noted in *Do*, the legislature expressly authorized and approved the health department's actions to address the problem on the local level in KRS 211.901(4). *Id.* at 521. In this case, there is no underlying legislative enactment to support the Board of Health's actions in Bullitt County. While the Supreme Court discussed KRS 212.350 in *Do*,[7] this was dictum at best and otherwise was not the legal basis for the Supreme Court's decision in *Do*, which was premised upon the specific statutory authorization found in KRS 211.901(4). Again, no such authority exists in Kentucky today that permits county or district health boards to enact smoking bans in their respective counties.

The majority also relies on *Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745 (Ky. 2004). In this case, the Kentucky Supreme Court upheld a county-wide smoking ban passed by ordinance of the local elected urban county government, not a board of health. Curiously, and without any legal explanation, the majority elevates the regulation in Bullitt County to the "Bullitt ordinances" and thus applies the Supreme Court's legal analysis to this case. Contrary to majority's position, the Regulation in Bullitt County is totally and completely distinguishable from the ordinance in Lexington as it was passed by elected constitutional officers of the local

[7] In *Commonwealth v. Do, Inc.*, 674 S.W.2d 519 (Ky. 1984), the Kentucky Supreme Court made absolutely no reference to Kentucky Revised Statutes (KRS) 212.230(1)(c). The Court's discussion of KRS 212.350 was limited to counties containing cities of the first class, which only pertained to Jefferson County in 1984.

government, with authority to do the same. In my opinion, the Supreme Court's ruling in the *Lexington Fayette County Food & Beverage Ass'n* case has absolutely no application to the Regulation passed by the Board of Health in Bullitt County, where there existed no express legislative grant of authority to the Board of Health to pass a smoking ban.

Finally, absent legislative mandates, if the courts permit an overly broad interpretation of KRS 212.230(1)(c), there would be no limit on the regulatory authority of local health boards under the guise of public health. For example, under the majority's interpretation of the statute, there is nothing to prevent the Board of Health from regulating the sale of soft drinks over 16 ounces in size in convenience stores or limiting or regulating the number of cheeseburgers sold by fast food restaurants, which most would agree are contributing to the obesity of our children and adults, a legitimate public health concern. There would also be no restrictions on a health board to enact county-wide gun control rules or restrictions or implement regulations relating to the sale or consumption of alcoholic beverages, "to protect the health of the people." None of the aforementioned were arguably perceived as significant public health issues in 1954 but could be regulated today by the Board of Health under the majority's proposed interpretation. In fact, the reach of the Board of Health's regulatory power would be limitless.

In conclusion, I submit there exists no sufficient legislative grant of authority for the Board of Health to regulate smoking in Bullitt County. While the

Board of Health's goals are certainly admirable, there simply exists no statutory enactment that specifically enables the Board of Health to adopt Regulation 10-01, in my opinion.

For these reasons, I would affirm the circuit court's order enjoining the Regulation.

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