



# COMMONWEALTH of VIRGINIA

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July 10, 2007

The Honorable Bill Janis  
Member, House of Delegates  
P.O. Box 3703  
Glen Allen, Virginia 23058

Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether a locality is authorized to regulate or place restrictions on smoking that are stricter than those imposed by the Virginia Clean Indoor Air Act. Specifically, you ask whether a locality effectively may ban smoking in all restaurants by denying restaurants a zoning permit unless the restaurants agree to be smoke-free.

## Response

It is my opinion that a locality may not impose restrictions on smoking that are more stringent than those authorized by the Virginia Clean Indoor Air Act. It further is my opinion that a locality may not ban all smoking in restaurants.

## Applicable Law and Discussion

Section 15.2-2803(B), a portion of the Virginia Indoor Clean Air Act<sup>1</sup> ("Act"), provides that "[u]nless specifically permitted in [Chapter 28], ordinances adopted after January 1, 1990, shall not contain provisions or standards which exceed those established in this chapter."

Further, § 15.2-2801 of the Act, which is titled "[s]tatewide regulation of smoking,"<sup>2</sup> provides that:

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<sup>1</sup>VA. CODE ANN. tit. 15.2, ch. 28, §§ 15.2-2800 to 15.2-2810 (2003).

<sup>2</sup>While the title or headline of a statute "is no part of the act itself, ... it does tell us what the legislature had in mind." *Sauer v. Monroe*, 171 Va. 421, 425, 199 S.E. 487, 488 (1938); *accord Chambers v. Higgins*, 169 Va. 345, 351, 193 S.E. 531, 533 (1937).

C. Any restaurant having a seating capacity of fifty or more persons shall have a designated no-smoking area sufficient to meet customer demand. In determining the extent of the no-smoking area, the following shall not be included as seating capacity: (i) seats in any bar or lounge area of a restaurant and (ii) seats in any separate room or section of a restaurant which is used exclusively for private functions.

In § 15.2-2800 of the Act, the General Assembly defines “restaurant” as “any building, structure, or area, excluding a bar or lounge area as defined in [Chapter 28], having a seating capacity of fifty or more patrons, where food is available for eating on the premises, in consideration of payment.” Therefore, the Act does not contemplate a total ban on all smoking in restaurants.

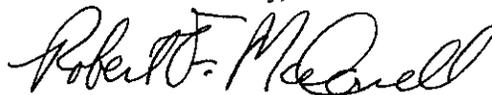
The basic issue you raise relates to the legal doctrine of preemption. An ordinance is inconsistent with state law when state law preempts such local regulation either expressly by prohibiting local regulation or by enacting state regulations so comprehensive that the state may be considered to occupy the entire field.<sup>3</sup> “[W]hen the General Assembly intends to preempt a field, it knows how to express its intention.”<sup>4</sup> In this instance, the General Assembly clearly has expressed its intention to preempt local regulation of smoking. Section 15.2-2803(B) provides that ordinances adopted by localities “shall not contain provisions or standards which exceed those established” in the Act. Under current law, localities may not impose smoking restrictions that exceed those imposed by the Act.<sup>5</sup>

#### Conclusion

Accordingly, it is my opinion that a locality may not impose restrictions on smoking that are more stringent than those authorized by the Virginia Clean Indoor Air Act. It further is my opinion that a locality may not ban all smoking in restaurants.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:875; 1:941/07-065

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<sup>3</sup>See *Lynchburg v. Dominion Theatres, Inc.*, 175 Va. 35, 40, 7 S.E.2d 157, 159 (1940); *Op. Va. Att’y Gen.*: 2001 at 141, 142; 1983-1984 at 86, 87; *c.f. King v. County of Arlington*, 195 Va. 1084, 1087-88, 81 S.E.2d 587, 590 (1954) (noting that state did not occupy entire field; therefore, locality could govern by ordinance); *see also Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961) (noting that ordinance conflicting with state law of general character and state-wide application is invalid).

<sup>4</sup>*Res. Conservation Mgmt., Inc. v. Bd. of Supvrs.*, 238 Va. 15, 23, 380 S.E.2d 879, 884 (1989), *quoted in* 1993 *Op. Va. Att’y Gen.* 173, 176.

<sup>5</sup>However, § 15.2-2803(A) provides that ordinances “enacted by a locality prior to January 1, 1990,” may not “be deemed invalid or unenforceable” because they are inconsistent with the Act.