

**IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT
DIVISION 26**

DELANO ENTERPRISES, INC., d/b/a)
MORTS CIGAR BAR, et al.,)
 Plaintiffs,)
))
vs.))
))
STEVE SIX, Attorney General of the)
State of Kansas, et al.,)
 Defendants.)
_____)

Case No. 10 CV 2522

MEMORANDUM DECISION

This matter is before the Court on Plaintiff’s Application for a Temporary Injunction. The Court heard evidence and argument from the parties on August 19, 2010, and took the matter under advisement. The Court is now prepared to rule.

I. Summary of the Court’s Ruling:

The Plaintiffs are not likely to succeed on the merits of their claim. As such, Plaintiffs are not entitled to a preliminary injunction. Plaintiffs’ application for a preliminary injunction is denied, and the temporary restraining order previously issued is dissolved.

II. Nature of the Case:

In 2008, the City of Wichita enacted Ordinance No 47-892, which regulates smoking within the City of Wichita. In 2010, the Kansas Legislature passed House Bill 2221, which regulates smoking state wide.

House Bill 2221 did not amend K.S.A. 21-4013, which provides:

“Nothing in this act shall prevent any city or county from regulating smoking within its boundaries, so long as such regulation is at

least as stringent as that imposed by this act. In such cases the more stringent regulation shall control to the extent of any inconsistency between such regulations and this act.”

Plaintiffs argue that the city ordinance is the more stringent regulation, and that the ordinance controls. Defendants argue that both the city ordinance and House Bill 2221 can co-exist, but to the extent there is any inconsistency in the two regulatory schemes, the more stringent regulation controls. Defendants argue that as to the Plaintiffs, House Bill 2221 is the more stringent regulation.

In addition, Plaintiffs argue that House Bill 2221 violates the Home Rule Amendment to the Kansas constitution which empowers cities to determine local affairs and government by city ordinance. Plaintiffs further argue that House Bill 2221 violates Article 2, §17 of the Kansas constitution because it does not have uniform operation in all Kansas counties. Defendants argue that House Bill 2221 does not violate the Home Rule Amendment, nor does it violate Article 2, §17 of the Kansas constitution.

II. Analysis:

In *Wichita Wire v. Lennox*, 11 Kan. App.2d 459, 461, 726 P.2d 287 (1986), the Court set forth the following principles applicable to requests for preliminary injunctions:

“An injunction is an equitable remedy and its grant or denial in each case is governed by principles of equity. *U.S.D. No. 503 v. McKinney*, 228 Kan. 224, Syl. ¶1, 689 P.2d 860 (1984). The purpose of a temporary or preliminary injunction is not to determine any controverted right, but to prevent injury to a claimed right pending a final determination of the controversy on its merits. The grant of a temporary injunction would not be proper if it would appear to accomplish the whole object of the suit without bringing the cause or claim to trial. A temporary injunction merely preserves the status quo until a final determination of a controversy can be made. *Comanche County Hospital v. Blue Cross of Kansas, Inc.*, 228 Kan. 364, 366 613 P.2d 950 (1980); *Evco Distributing, Inc. v. Brandau*, 6 Kan. App. 53, 56, 626 P.2d 1192 *rev. denied* 230 Kan. 817 (1981).”

In *Wichita Wire*, the Court set forth a four part test to determine whether a preliminary injunction should be issued. In order to obtain a preliminary injunction, the moving party must establish:

“(1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.” 11 Kan. App.2d at 462.¹

With respect to the burden of proof at this stage of the litigation, the *Wichita Wire* Court stated: “the movant must establish a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. The movant has the additional burden of showing a right to the specific injunctive relief sought because irreparable injury will result if the injunction is not granted. *There must be a probable right and a probable danger.*” *Id.* (emphasis in the original).

Each of the four factors set forth above will be considered below.

A. Likelihood of success on the merits:

Plaintiffs raise two challenges to House Bill 2221. First, Plaintiffs argue that the Wichita ordinance, as compared to House Bill 2221, is the more stringent regulatory scheme. Plaintiffs conclude that, pursuant to K.S.A. 21-4013, the Wichita ordinance controls. Second, Plaintiffs argue that House Bill 2221 is constitutionally flawed. Each argument will be addressed in turn.

¹ In addition to these four factors, case law requires that the Plaintiffs establish that they have no adequate remedy at law. *Board of Leavenworth County Comm’rs v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920 (2006). The Defendants concede that Plaintiffs have no adequate remedy at law. As such, no further analysis of this factor is necessary.

1. Which regulatory scheme is more stringent:

As a threshold matter, the Court must first resolve the disagreement between the parties as to the application of K.S.A. 21-4013, which allows cities to regulate smoking, and provides that such local regulation shall control to the extent of any inconsistency between such regulation and House Bill 2221. Plaintiffs argue that the language of K.S.A. 21-4013 requires the Court to evaluate the city ordinance, as a whole, and compare it to House Bill 2221, as a whole, and the more stringent regulatory scheme, as a whole, controls.

On the other hand, Defendants argue that nothing prevents the co-existence of the city ordinance and House Bill 2221. To the extent there are no inconsistencies, both regulatory schemes control. However, Defendants argue that to the extent that any inconsistencies exist, then the more stringent regulation controls.

The Kansas Supreme Court, in *Steffes v. City of Lawrence*, 284 Kan. 380, 160 P.2d 843 (2007), discussed the application of K.S.A. 21-4013. In that case, the City of Lawrence passed an ordinance that banned smoking in public places and places of employment. At the time, the ordinance was more prohibitive than state law. Mr. Steffes, a bar owner in Lawrence, filed suit contending that state law preempted the local ordinance. The Court held that state law allowed for local regulation of smoking, so long as the regulation was at least as stringent as state law:

“We initially observe that . . . the legislature has *expressly* acknowledged that cities may regulate smoking: ‘Nothing in this act shall prevent any city or county from regulating smoking within its boundaries.’ K.S.A. 21-4013. Indeed, the legislature only demands that ‘such regulation is at least as stringent as that imposed by this act.’ K.S.A. 21-4013.

“We conclude that under this statute, the legislature has invited cities to regulate smoking in public places to the maximum extent possible, *e.g.* ‘the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act.’ K.S.A. 21-4013. In our view, ‘stringent regulation’ can certainly include ‘absolute prohibition,’ *i.e.* the most stringent regulation of all. Stated another way, the legislature has set a floor, not a ceiling, for how much a city should regulate smoking.”

Accordingly, while cities are permitted to pass local ordinances which regulate smoking, state law requires that those ordinances be “at least as stringent” as state law. This is consistent with the general rule that a city may not by ordinance authorize that which state law prohibits, but may enact stricter regulations than those imposed by state law. *City of Junction City v. Lee*, 216 Kan. 495, 502-03, 532 P.2d 1291 (1975); *Leavenworth Club Owners Assoc. v. Atchison*, 208 Kan. 318, 321-22, 492 P.2d 183 (1971).

There is nothing in the law that suggests that city ordinances cannot co-exist with state law. In *Leavenworth Club Owners*, cited above, the Court stated:

“There mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, *both will stand.*” (Emphasis added.) 208 Kan. at 320-21, quoting 56 Am. Jur.2d *Municipal Corporations, Etc.*, §374.

As noted above, K.S.A. 21-4013 contemplates that cities will enact ordinances which regulate smoking. Further, K.S.A. 21-4013 anticipates the possibility of conflict between local ordinance and state law. “In such cases the more stringent regulation shall control to the extent of any inconsistency between such regulations and this act.” K.S.A. 21-4013. Accordingly, with respect to this case, to the extent that the Wichita ordinance

permits that which House Bill 2221 prohibits, House Bill 2221 controls.² To the extent that the Wichita ordinance imposes regulations that are stricter than House Bill 2221, the ordinance controls. Thus, to determine whether the Plaintiffs are likely to succeed on the merits of their claim, this Court is required to determine which regulatory scheme, as applied to them, is more stringent.

There is no question that House Bill 2221, as to these Plaintiffs, is the more stringent regulatory scheme. With respect to those Plaintiffs who operate smoker friendly businesses, the Wichita ordinance respects the freedom of these business owners to market goods and services to a customer base that largely consists of smokers. On the other hand, House Bill 2221 prohibits smoking in all enclosed areas of these businesses. While the Plaintiffs correctly point out that the Wichita ordinance includes regulatory hoops that are not found in House Bill 2221, that is because House Bill 2221 prohibits smoking in places where the Wichita ordinance allows it.

In regard to the Plaintiff Setter Foundation, Father H Setter testified that under the Wichita ordinance he is able to host his annual cigar benefit dinner at the Wichita Airport Hilton so long as he complies with the regulatory requirements of the ordinance.³ House Bill 2221 prohibits smoking in the venue where Father H hosts his benefit dinner.

The primary difference between the Wichita ordinance and House Bill 2221 is that the Wichita ordinance strikes a reasonable compromise between the freedom of businesses to cater to customers who smoke and non-smokers who wish to avoid

² Plaintiffs' argument that a regulatory scheme that allows smoking but imposes onerous requirements is "more stringent" than a regulatory scheme that bans smoking is contrary to the observation by the Kansas Supreme Court in *Steffes*, 284 Kan. 380 at 387, that an absolute prohibition is "the most stringent regulation of all."

³ Father H has hosted 14 annual benefit dinners for cigar aficionados. These benefit dinners have raised hundreds of thousands of dollars for the needy and underprivileged in Sedgwick County.

exposure to second hand smoke.⁴ In regard to these businesses, House Bill 2221 eschews compromise in favor of a blanket prohibition. It is not for this Court to determine which regulatory scheme makes the most sense or is the more reasonable. Rather, the question for this Court is, as applied to these Plaintiffs, which regulation is the more stringent. As was observed by the Kansas Supreme Court in *Steffes*, the prohibition of smoking is “the most stringent regulation of all.” *Steffes*, 284 Kan. 380 at 387.

2. Is House Bill 2221 constitutionally flawed?

The fall back argument for the Plaintiffs is that House Bill 2221 is unconstitutional because: (1) it violates the Home Rule Amendment of the Kansas Constitution; and (2) because it does not have uniform application throughout the state. Each argument will be addressed in turn.

a. The Home Rule Amendment:

“The Home Rule Amendment to the Kansas constitution provides that cities are empowered to determine their local affairs and government by ordinance passed by the city governing body.” *Steffes*, 284 Kan. 380 at 385. However, the power granted to cities under the Home Rule Amendment is not unlimited. As noted above, “[a] city may not by ordinance authorize that which a statute prohibits.” *Leavenworth Club Owners*, 208 Kan. 308 at 321. “[W]here an ordinance is repugnant to the statutes of a state, or to regulations having the force and effect of state law, the latter must prevail.” *Id.* at 320.

In the *Steffes* case, cited by the Plaintiffs, the Court upheld an ordinance passed by the City of Lawrence that provided for stricter regulation of smoking than what was then

⁴ For example, for those restaurants who wish to accommodate their smoking customers, the Wichita ordinance permits eating establishments who are not designated as “smoker friendly” to install smoking rooms. The ordinance requires that these rooms must, among other things, maintain a negative air pressure and exhaust smoke contaminated air directly outdoors. The smoking rooms protect non-smoking diners from any exposure to second hand smoke, while at the same time accommodating those diners who smoke.

state law. The Court found that the City of Lawrence had the power under the Home Rule Amendment to enact ordinances to determine local affairs, and further had the power to adopt regulations that were stricter than state law. Those facts are different from the facts in the instant case.

In this case, the Wichita ordinance permits smoking in venues where House Bill 2221 prohibits smoking. Although the City of Wichita has the power, under the Home Rule Amendment, to enact ordinances that regulate smoking, the City of Wichita does not have the power under the Home Rule Amendment to authorize by ordinance what state law prohibits.

b. Uniform operation of House Bill 2221:

Plaintiffs' argument on this point is that House Bill 2221 exempts from the smoking ban "the gaming floor of a lottery gaming facility or racetrack gaming facility, as those terms are defined in K.S.A. 74-8702." Plaintiffs point out that K.S.A. 74-8702 carves out six Kansas counties where casinos can be located: Wyandotte, Crawford, Cherokee, Sedgwick, Sumner and Ford. Plaintiffs reason, then, that only these 6 counties gain the benefit of casino exemption to House Bill 2221 which violates the requirement of Article 2, §17 of the Kansas constitution that laws of a general nature have uniform geographical application throughout the State.

Article 2, §17 of the Kansas constitution states:

"All laws of a general nature shall have a uniform operation throughout the state: *Provided*, The legislature may designate areas in counties that have become urban in character as 'urban areas' and enact special laws giving to any one or more of such counties or urban areas such powers of local government and consolidation of local government as the legislature may deem proper."

In *State v. Butler County*, 77 Kan. 527, 94 Pac. 1004 (1908) the Court rejected a challenge under Article 2, §17 to a state law that provided that in counties of a certain class the board of county commissioners could erect permanent county buildings upon the petition of one-fourth of the resident taxpayers of the county. The Court reasoned as follows:

“It is urged that the act in question is a general law which can apply to not more than two counties in the state. If, however, it operates uniformly on all the members of the class to which it applies it is not open to the objection, provided the classification adopted by the legislature is not an arbitrary or capricious one. The legislature has the power to enact laws of a general nature which will be applicable only to a certain portion of the state or to a certain class of citizens. The following language is from the syllabus of the case of *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915: ‘An act, to have a uniform operation throughout the state, need not affect every . . . community alike.’ The fact that there are at present but few counties to which the exception can apply does not of itself render the act repugnant to this provision of the constitution.” *Id.* at 533-34.

The Court, in *Board of Riley County Comm’rs v. City of Junction City*, 233 Kan. 947, 959, 667 P.2d 868 (1983) found that a state statute prohibiting the annexation of United States military reservations did not violate Article 2, §17, even though the statute affected only those cities in proximity to military reservations:

“The classification in the instant case is rational. It applies to at least four cities which touch or soon may touch the Fort Riley military reservation, even if it be assumed that the only military reservation to which the statute has applicability is Fort Riley. In addition, it is entirely possible that new military reservations under the jurisdiction of the Secretary of the Army may well be established in this state in the future as they have been in the past. The City contends that the statute does not relate to Fort Leavenworth and that it could not apply to McConnell Air Base since that base is under the jurisdiction of the Secretary of the Air Force rather than the Secretary of the Army. Assuming these contentions to be true the Constitution does not require that state statutes apply uniformly to all *military reservations* – the requirement is that they apply uniformly to all affected cities.”

With respect to House Bill 2221, the legislature made a public policy decision to exempt casinos from the smoking ban.⁵ Article 2, §17 of the Kansas Constitution requires that this exemption apply uniformly to all counties, and it does. The fact that some counties are not impacted due to the fact that they have no casinos does not create constitutional problems. See *Sossman v. Board of County Comm'rs*, 230 Kan. 210, 212, 630 P.2d 1154 (1981)(state statute that applied to any county in which any part of a federal reservoir was located did not violate Article 2, §17, even though approximately 25 counties had federal reservoirs in whole or in part within their boundaries). The state law which limits casinos to 6 Kansas counties, like all state laws, is subject to future amendment by the legislature. Any county where casinos are now located, or where casinos may be located in the future, are uniformly subject to House Bill 2221. Accordingly, there is no violation of Article 2, §17 of the Kansas constitution. See *Common School District No. 6 v. Robb*, 179 Kan. 162, 165-66, 293 P.2d 230 (1956) (the mere fact that a statute, when enacted, may apply to only one city, one county or one school district does not violate Article 2, §17, if the law is general in form and “its provisions are such that in the ordinary course of things the law might, and probably would, apply to other governmental units coming within the specified classification”).

Further, even if the Court presumes that the casino exemption provided in House Bill 2221 was in violation of Article 2, §17, that does not lead to the conclusion that the entirety of House Bill 2221 is unconstitutional. K.S.A. 21-4014 states:

“If any provision of this act or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions of application of this act that can be given effect

⁵ According to the news report offered by Plaintiffs, this public policy decision appears to have been the result of successful lobbying efforts by casinos who argue that banning smoking in casinos will result in a 30 to 35% drop in casino revenues.

without the invalid provision or application, and to this end the provisions of this act are declared to be severable.”

Accordingly, if the Plaintiffs can establish at trial that the casino exemption in House Bill 2221 is unconstitutional, the remedy would be to strike the casino exemption from the act. This would leave the balance of House Bill 2221 intact, including those provisions that are applicable to the Plaintiffs.

3. Plaintiffs are not likely to succeed on the merits:

The Plaintiffs correctly note that, at this stage of the litigation, they are not required to prove their case, but simply establish a reasonable likelihood that they will prevail on the merits of their claim. *Wichita Wire v. Lennox*, 11 Kan. App.2d 459 at 461-62. However, the question of which regulatory scheme is the more stringent can be resolved by analysis of the Wichita ordinance and House Bill 2221, and is not dependent upon the resolution of disputed facts. Likewise, the question of whether House Bill 2221 violates the Kansas constitution does not require the Court to resolve questions of fact.

Based upon the analysis provided above, Plaintiffs are not reasonably likely to establish at trial that the Wichita ordinance, as applied to them, is a more stringent regulation of smoking than the blanket prohibition mandated by House Bill 2221. Nor are the Plaintiffs likely to establish at trial that House Bill 2221, as it applies to them, violates the Kansas constitution. Accordingly, Plaintiffs have not demonstrated that they are entitled to a preliminary injunction.

Because the Plaintiffs are entitled, pursuant to K.S.A. 60-2101(a)(2), to take a direct appeal from this ruling, the Court will consider whether the other requirements necessary for the issuance of a preliminary injunction have been met.

B. Irreparable injury:

Larry Doss, who owns and operates Walt's Sports Bar, testified that the smoking prohibition mandated by House Bill 2221 will result in a loss of 30 to 35% of his business, which translates into a loss of approximately \$300,000. Although evidence was not presented as to the other Plaintiffs who operate similar businesses, the parties stipulated that the business loss as to these Plaintiffs would be similar. Ali Issa, who owns and operates the Heat Cigar & Hookah Lounge, testified that House Bill 2221 will force him to close. The Defendants did not seriously contest the fact that House Bill 2221 will result in significant lost revenues to these Plaintiffs.

Separate and apart from the economic loss that these Plaintiffs will suffer as a result of House Bill 2221 is the loss of the freedom that business owners have to make business judgments based upon their customer base. Larry Doss testified that 65 to 70% of his customer base is smokers. The Wichita ordinance gives businessmen like Mr. Doss the freedom to chose whether to be a smoker friendly business or not. If a business elects to be a smoker friendly business, it can be presumed that this business will lose customers who are non-smokers and customers who are under the age of 18, but will gain customers who smoke. Under the Wichita ordinance, businesses are free to make the independent business judgment whether to be a smoker friendly business based on their customer base. This *freedom of choice* that businesses have to cater to a smoking customer base vanishes under House Bill 2221. The loss of this freedom of choice cannot be remedied with a money judgment.

Accordingly, for the purpose of considering these Plaintiffs' request for a preliminary injunction, these Plaintiffs can establish irreparable injury.

With respect to the Plaintiff Setter Foundation, Father H testified that the Plaintiff Setter Foundation would no longer be able to host its annual cigar benefit dinner at the Wichita Airport Hilton. However, since this benefit is generally held in June, and it is likely that this case will proceed to trial before then, the Setter Foundation will not likely be impacted by the provisions of House Bill 2221 prior to the trial of this matter.⁶

C. Balancing of the injury to Plaintiffs and Defendants:

The third factor Plaintiffs must establish is that the harm they will suffer if House Bill 2221 is allowed to take effect is greater than the harm that will be suffered by the Defendants if a preliminary injunction is issued. Because the Defendants are those individuals responsible for enforcing House Bill 2221, the pertinent question is whether the harm suffered by the Plaintiffs if House Bill 2221 is allowed to take effect greater than the harm that will be suffered by the general public if a preliminary injunction is issued.

In that regard, under the Wichita ordinance those Plaintiffs who chose to be smoker friendly businesses must post at each entrance to their place of business notice that they are “smoker friendly.” Those non-smoking members of the general public who wish to avoid exposure to second hand smoke are given appropriate notice under the Wichita ordinance to allow them to avoid places where individuals may be smoking. Accordingly, in balancing the harm to be suffered by each of the parties, it is apparent that the impact to the Plaintiffs (with the exception of the Plaintiff Setter Foundation) of

⁶ It is possible, of course, for the Setter Foundation to host an annual charity benefit dinner at the Wichita Airport Hilton that does not include cigar smoking. However, this would significantly change the character and nature of the event, since the event is designed to appeal to cigar aficionados, and the ability to enjoy a fine cigar with a well prepared meal is the feature which distinguishes this charity event from others.

allowing House Bill 2221 to take effect is greater than the impact to the general public if a preliminary injunction is issued.

D. The public interest:

The Defendants argue in their brief that “smoking and breathing secondhand smoke are harmful to the public health.” The Defendants further argue that “the State has a legitimate interest in the health of its citizens” and that the issuance of a preliminary injunction would be adverse to the public interest.

These arguments must be taken with a grain of salt. Although the Defendants argue that smoking and breathing second hand smoke are harmful to the public health, the legislature has nevertheless permitted smoking in casinos. The Plaintiffs are justifiably upset that they are being forced to make an economic sacrifice in the name of public health that the State of Kansas is unwilling to impose on casinos.⁷ If the State of Kansas is willing to risk the health of the general public by allowing smoking in casinos in order to protect the revenue stream into the State’s general fund, Defendants cannot credibly argue that a preliminary injunction in favor of the Plaintiffs is adverse to the public interest.

III. Conclusion:

There is no question that the Kansas legislature can, through the exercise of its police power, regulate smoking in the State. The scope and breadth of that regulation is a matter of public policy, and it is not for this Court to second guess the wisdom of that policy.

⁷ The Court has received e-mails from various individuals who are not parties to this case urging the Court to lift the temporary restraining order and to allow enforcement of House Bill 2221. It is always easy to advocate for a public policy which requires someone else to pay an economic price.

Through House Bill 2221, the State has banned smoking in places of business owned by the Plaintiffs, or in the case of the Setter Foundation, in places where charity smoking events occur. That ban is clearly a more stringent regulation of smoking than the Wichita ordinance. Regardless of the merits of the Wichita ordinance, a municipality cannot by ordinance permit that which state law prohibits.

Further, while the provisions in House Bill 2221 exempting casinos from the smoking ban may offend an inherent sense of fairness, it cannot be said that House Bill 2221 violates the provisions of Article 2, §17 of the Kansas constitution.

The Plaintiffs are not likely to succeed on the merits of their claim. As such, Plaintiffs are not entitled to a preliminary injunction. Plaintiffs' application for a preliminary injunction is denied, and the temporary restraining order previously issued is dissolved.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

The Court certifies that a true and correct copy of this Memorandum Decision was deposited in the United States mail, postage prepaid, on the 31ST day of August, 2010, addressed to:

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