



## Local Board of Health Authority for Tobacco Control<sup>1</sup>

Local boards of health are administrative bodies whose members are appointed or elected to lead, guide, and oversee the delivery of public health services and activities in their communities.<sup>2</sup> The role boards of health play in public health generally, and tobacco control in particular, depends on their legal authority and powers as defined in state statutes. Because their role varies by jurisdiction, local boards of health are often involved in tobacco use prevention and control in different ways. Some boards enact rules and regulations, while others advise or make recommendations to the local governing body for public health, such as a city council, county board of commissioners, or tribal board. All boards of health, regardless of the extent of their legal authority, are obligated to enact or recommend policies that serve the public's health.<sup>3</sup>



Occasionally local tobacco policies adopted by boards of health are challenged in court on the ground that the boards lack regulatory authority. This fact sheet provides an overview of common regulatory powers of local boards of health and legal challenges regarding the authority of local boards to pass tobacco control policies.

### Local Boards of Health and Regulatory Authority

Most state statutes do not expressly define the role of local boards of health, although they generally do include language about specific board powers. Board of health regulatory powers most often found in statutes include the ability to make rules and regulations concerning public health, investigate and abate nuisances, and provide health services to the community<sup>4</sup> – each of which can be used to support tobacco control measures. Some statutes specifically identify board of health powers in regulating tobacco, such as the legal authority to restrict smoking in public places; enforce tobacco-free restrictions; restrict vending machine sales of tobacco products; prohibit free tobacco samples and single cigarette sales; prohibit self-service tobacco displays; and conduct tobacco retailer compliance checks.<sup>5</sup>

Regardless of their legal authority to implement or enforce tobacco control laws, boards of health are always able to support the governing body that is responsible for implementing and enforcing these laws.<sup>6</sup> Local boards serve as overall advocates for public health by ensuring that (1) adequate resources are available in the community to provide needed public health services and (2) effective local policies and procedures are in place to protect and promote public health.

## Local Board of Health Regulatory Considerations

In determining whether a local board of health has the authority to adopt a tobacco control regulation, courts examine the statutory language that grants the authority, the legislative history surrounding the enactment of the statute, and the overall statutory scheme.<sup>7</sup> Some of the basic issues courts consider are the local board's jurisdiction and the type and scope of authority that the state delegates to it.

**Local Board Jurisdiction.** Boards of health typically cover two or more jurisdictions such as municipalities, counties, or districts. For example, a county board of health would generally have the authority to regulate matters within both the incorporated and unincorporated areas of a county. Also, many local boards of health combine jurisdictions, such as city-county or city-city boards of health. If a board's multi-jurisdictional authority appears to overlap with that of other local regulatory agencies, the courts will review the enabling statutes to determine the relationship between the various jurisdictions and the controlling authority.

**Delegation of Authority.** As mentioned earlier, statutes typically contain language defining specific powers of boards of health as delegated by the state legislature. These statutes often describe the function, duty or responsibility of boards of health and other local governing bodies to safeguard and protect public health. In some states, such as Georgia, statutes indicate that boards of health have authority to adopt reasonable regulations that prevent disease, eliminate unsanitary conditions, and do not conflict with state regulations.<sup>8</sup> They are also empowered to issue orders and directives "to abate or minimize any practice or any operation or condition that constitutes or may be reasonably deemed to constitute a hazard to the health and safety of the employees or the general public."<sup>9</sup> In other states, such as Massachusetts, courts have found that boards of health have the full authority to pass smoke-free regulations independently.<sup>10</sup>

**Scope of Authority.** Even if a local board of health has broad authority to act and appears to have the authority to pass a smoke-free regulation, state law may preempt any local body – including the board – from adopting that type of regulation. Preemption occurs when a higher level of government restricts, or even strips away, a lower level of government's ability to regulate with respect to a particular issue.<sup>11</sup> For example, preemption has often been used to undermine local and state tobacco control campaigns and initiatives. If local boards of health in a state are preempted from passing tobacco-free regulations, they might work toward strengthening other tobacco use prevention and control regulations where authority is more certain. They can also help educate the community about the dangers of secondhand smoke and the health and economic benefits of tobacco-free measures, and build support from the community and business owners for more effective and comprehensive tobacco control regulations.<sup>12</sup>

## Select Challenges to Tobacco Control Authority of Boards of Health

Below are a few examples of legal challenges to the authority of local boards of health to regulate tobacco.<sup>13</sup> We have included these examples to illustrate various ways in which the courts have interpreted the regulatory authority of boards.

State	Case	Overview & Ruling
<b>Kentucky</b>	<i>Bullitt Fiscal Court et al. v. Bullitt County Board of Health</i> , 2013-SC-000023-DG (KY 2014)	The Kentucky Supreme Court ruled that the Bullitt County Board of Health exceeded its statutory authority in adopting a countywide smoke-free regulation. The court held that the Board's adoption of the regulation reflected "an expansive interpretation" of the Board's authority, that the county legislative body and not the Board of Health had the authority to impose regulations involving public health and that the smoke-free regulation was thus invalid.
	<i>Richardson v. Hopkins County Board of Health</i> , Civ. Action No. 08-CI-01116 (Hopkins Cir. Ct. Jan. 5, 2009)	The trial court found that the county board of health had the power to adopt regulations for the promotion and safeguarding of public health and therefore could adopt a regulation prohibiting smoking. The court looked at a few different statutory provisions, including one that indicated that "[c]ounty, city-county, and district boards of health shall: 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." <sup>14</sup> This case was not appealed to the Kentucky Court of Appeals or the Kentucky Supreme Court.
<b>Massachusetts</b>	<i>Tri-Nel Mgmt. v. Bd. of Health of Barnstable</i> , 741 N.E.2d 37 (Mass. 2001).	In <i>Tri-Nel</i> , the court found that boards of health have the authority to pass smoke-free regulations. The Massachusetts enabling act states that county and local "boards of health may make reasonable health regulations." <sup>15</sup> In <i>Am. Lithuanian Naturalization Club v. Bd. of Health of Athol</i> , 844 N.E.2d 231 (Mass. 2006)
	<i>Am. Lithuanian Naturalization Club v. Bd. of Health of Athol</i> , 844 N.E.2d 231 (Mass. 2006)	In <i>Am. Lithuanian Naturalization Club</i> , the court found that the town board of health had the authority to pass a smoke-free regulation. The court focused on the state smoke-free law's non-preemptive clause and the scope of the power delegated to the board.
<b>New York</b>	<i>Boreali v. Axelrod</i> , 517 N.E.2d 1350 (N.Y. 1987); <i>Justiana v. Niagara County Dep't of Health</i> , 45 F. Supp. 2d 236 (W.D.N.Y. 1999); <i>Leonard v. Dutchess County Dep't of Health</i> , 105 F. Supp. 2d 258 (S.D.N.Y. 2000); <i>Dutchess/Putnam Rest. &amp; Tavern Ass'n v. Putnam County Dep't of</i>	These cases from New York found that local health departments do not have the authority to pass smoke-free regulations. It seems likely that the outcome of these cases depended heavily on the fact that the New York legislature had struggled at the time with the idea of whether to pass a smoke-free law and ultimately did not do so. Additionally, at least one court was troubled by the numerous

*Health*, 178 F. Supp. 2d 396  
(S.D.N.Y. 2001)

exemptions in the regulations, pointing out that the health department was balancing economic concerns rather than focusing strictly on health.

<b>Ohio</b>	<i>Cookie's Diner, Inc. v. Columbus Bd. of Health</i> , 640 N.E.2d 1231 (Franklin County Ohio Mun. Ct. 1994); <i>D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health</i> , 773 N.E.2d 536 (Ohio 2002)	In <i>Cookie's Diner</i> , the court held that while no separation of powers principles were violated, two boards of health exceeded their authority when passing smoke-free regulations. The <i>D.A.B.E. v. Toledo-Lucas</i> supreme court found that, while the statute that gave boards of health the authority to pass regulations was very broad, other statutory sections within that same chapter enumerated, and thus limited, the types of activities that fell within the scope of the boards' power. The supreme court held that the smoke-free regulation was an invalid exercise of the legislative power because the board balanced social, political, economic, and privacy concerns.
<b>Washington</b>	<i>Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't</i> , 105 P.3d 985 (Wash. 2005)	The court found that the smoke-free regulation adopted by the local board of health and implemented by the health department was in direct conflict with the state clean indoor air law, and was thus invalid.
<b>Wyoming</b>	<i>Flat Creek Dev. Co. v. Teton Health Dist.</i> , Civ. Action No. 15027 (Teton Cty. Dist. Ct. (Feb. 9, 2011))	The district court ruled that the Teton District Board of Health exceeded the rulemaking authority granted to a board of health by enacting Teton County's Smokefree Air Rule of 2009 without clear direction from the state legislature. The court said the board enacted rules beyond the scope of an area regulated by the state Department of Health. "[H]owever well-intentioned and beneficial the regulation may be, the Court nonetheless cannot extend the authority of the District Board of Health beyond clearly stated and well-defined limits within the law and constitution." <sup>16</sup> As a result, the court struck down the countywide Smoke-free Rule.

## Other Helpful Resources

The Tobacco Control Legal Consortium's synopsis, [Legal Authority to Regulate Smoking and Common Threats and Challenges](#), provides information about legal challenges to the authority of boards of health to regulate smoking. The Consortium's parent organization, the [Public Health](#)

[Law Center](#), features a web page of resources about [preemption](#), a common issue raised in legal challenges to a board of health's regulatory authority in tobacco control. More information about preemption and public health is available on the [Grassroots Change](#) website. Additional resources about the regulatory authority of local boards of health are available at the [National Association of Local Boards of Health](#) website, including a digest of *Board of Health Success Stories Implementing and Supporting Tobacco Control Laws*.

## Contact Us

Please feel free to contact the [Tobacco Control Legal Consortium](#) with any questions about the information included in this fact sheet or about drafting a strong tobacco control policy.

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## Notes

<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> Ned E. Baker & Marie Fallon, *Board of Health*, Oxfordbibliographiesonline.com (2011), available at <http://www.oxfordbibliographiesonline.com/display/id/obo-9780199756797-0015>.

<sup>3</sup> *Id.*

<sup>4</sup> NAT'L ASSOC. OF LOCAL BDS. OF HEALTH (NALBOH), THE LEGAL AUTHORITY FOR TOBACCO CONTROL IN THE UNITED STATES (3<sup>RD</sup> ED.) (2009), available at [http://c.ymcdn.com/sites/www.nalboh.org/resource/resmgr/Legal\\_Authority\\_Tobacco\\_Cont.pdf](http://c.ymcdn.com/sites/www.nalboh.org/resource/resmgr/Legal_Authority_Tobacco_Cont.pdf). See also North Carolina Inst. Public Health, *Board of Health Rulemaking Authority: A Primer for Local Boards of Health* (free online course; last accessed Aug. 1, 2014), available at <http://sph.unc.edu/nciph/nciph-bohrulemaking/#req>.

<sup>5</sup> See NALBOH, THE LEGAL AUTHORITY FOR TOBACCO CONTROL IN THE UNITED STATES, *supra* note 4.

<sup>6</sup> Nat'l Assoc. of Local Bds. of Health, *Board of Health Success Stories: Implementing & Supporting Tobacco Control Laws* (2010), available at <http://c.ymcdn.com/sites/www.nalboh.org/resource/resmgr/BOH-Tobacco-Control-Law-Succ.pdf>.

<sup>7</sup> Cheryl Sbarra, Tobacco Control Legal Consortium, *Legal Authority to Regulate Smoking and Common Threats and Challenges: 2009* (2009), available at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009_0.pdf).

<sup>8</sup> GA. CODE § 31-3-4.

<sup>9</sup> GA. CODE § 31-12-8.

<sup>10</sup> *Tri-Nel Mgmt. v. Bd of Health of Barnstable*, 741 N.E.2d 37 (Mass. 2001).

<sup>11</sup> See NPLAN & Public Health Law Center, *The Fundamentals of Preemption* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/nplan-fs-fundamentals-2010.pdf>.

<sup>12</sup> Nat'l Assoc. of Local Bds. of Health, *Smoke-free Policy Guidelines for Boards of Health* (2009), available at [http://c.ymcdn.com/sites/www.nalboh.org/resource/resmgr/CIA\\_Fact\\_Sheets\\_All\\_FINAL.pd.pdf](http://c.ymcdn.com/sites/www.nalboh.org/resource/resmgr/CIA_Fact_Sheets_All_FINAL.pd.pdf).

<sup>13</sup> See, e.g., Joanna V. Dearlove & Stanton A. Glantz, *Boards of Health as Venues for Clean Indoor Air Policy Making*, 92 AM. J PUBLIC HEALTH 257-65 (2002) (describing three strategies that the tobacco industry uses in opposing health board tobacco control regulations: “accommodation” – that is, tobacco industry public relations campaigns to accommodate smokers in public places; legislative intervention;

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and litigation. Many of these strategies are executed with the help of tobacco industry front groups or allies in the hospitality industry), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447053>.

<sup>14</sup> KY. REV. STAT. § 212.230(1)(c) (2008).

<sup>15</sup> MASS. GEN. LAWS ch. 111 § 31.

<sup>16</sup> *Flat Creek Dev. Co. v. Teton Health Dist.*, Civ. Action No. 15027 (Teton Cty. Dist. Ct. 10 (Feb. 9, 2011)).