

11/15/17

Sarah Fertig  
Memorial Hall  
120 SW 10<sup>th</sup> Ave  
2<sup>nd</sup> Floor  
Topeka KS 66612

Dear Ms. Fertig:

I am writing in response to your request for the League's position on whether a city ordinance or county resolution that prohibits the sale of cigarettes or tobacco products to persons under 21 years of age is valid under state law. My opinion will focus solely on the League's area of expertise, city ordinances.

K.S.A. 79-3321(l) provides that it is unlawful for any person to "sell, furnish or distribute cigarettes, electronic cigarettes or tobacco products to any person under 18 years of age." K.S.A. 79-3321(m) makes it unlawful for any person "who is under 18 years of age to purchase or attempt to purchase cigarettes, electronic cigarettes or tobacco products," and K.S.A. 79-3321(n) makes it unlawful for any person "who is under 18 years of age to possess or attempt to possess cigarettes, electronic cigarettes or tobacco products."

Under Article 12, §5(b) of the Kansas Constitution, cities can only be bound by state laws uniformly applicable to all cities regardless of whether the subject matter of the state law is one of statewide or local concern. The State may only preempt the constitutional authority of cities in the manner prescribed in the Home Rule Amendment. See *Kline v. Unified Government of Wyandotte County / Kansas City, Kansas*, 277 Kan. 516, 85 P.3d 1237 (2004).

The Supreme Court has "a duty to preserve the validity of the ordinance and to search for ways to uphold its constitutionality. [It] must presume that the ordinance is constitutional, resolve all doubts in favor of validity, uphold the ordinance if there is any reasonable way to construe it as constitutional, and before striking the ordinance." *City of Wichita v. Hackett*, 275 Kan. 848, 853, 69 P.3d 621, 625-26 (2003).

Cities may enact an ordinary home rule ordinance when there is a uniform state law on the subject and the city would like to supplement the state law provided there is no conflict between the state law and the local ordinance.

"The primary method of determining whether an ordinance is inconsistent with a state standard is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits. *Missouri Pacific Railroad v.*

*Board of Greeley County Comm'rs*, 231 Kan. 225, 227, 643 P.2d 188 (1982). Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than is required by the statute, there is no conflict between the two unless the legislature has limited the requirements for all cases to its own prescription. *Leavenworth Club Owners Assn. v. Atchison*, 208 Kan. 318, Syl. ¶ 3, 492 P.2d 183 (1971)." *City of Wichita v. Basgall*, 257 Kan. 631, 635, 894 P.2d 876, 880 (1995).

The fact that the local ordinance is more restrictive than the state law does not create a conflict. See *City of Wichita*, 275 Kan. at 635 (upheld an ordinance extending the city's DUI ordinance to cover operating a bicycle while under the influence); See also *Hutchison Human Relations Commission v. Midland Credit Management, Inc.*, 213 Kan. 308, 517 P.3d 158 (1973) (affirmed the ability of cities to establish local civil rights agencies despite the existence of state laws prohibiting acts of discrimination); See also *City of Junction City v. Lee*, 216 Kan. 495, 499, 532 P.2d 1292 (1975) (upheld an ordinance defining the crime of unlawful use of weapons as the carrying of both concealed and unconcealed weapons despite the uniform state law only making it a crime to carry a concealed weapon); See also *Leavenworth Club Owners Association v. Atchison*, 208 Kan. 318, 492 P.2d 183 (1971) (upheld an ordinance making establishing a more restrictive closing time for private clubs than state law).

The fact that the state has enacted legislation on a subject does not necessarily deprive a city of power to deal with the same subject. Legislative intent to reserve exclusive jurisdiction to the state must be clearly manifested in the statute before it can be held the state has withdrawn power from the city to regulate the area. See *Junction City*, 216 Kan. at 502. If the area of law has not been clearly preempted by the Legislature, local action is permitted. See *Kline*, 277 Kan. At 516; See also *Junction City*, 295 Kan. at 438.

K.S.A. 79-3321 fails to contain clear preemptive language. As such, it is the opinion of the League that the Legislature has failed to clearly preempt the field. Unless there is a uniform law applicable to all cities which contains language expressly prohibiting local legislation, then a city has the authority pass an ordinance on the subject provided there is no conflict between the local provisions and state law. Both the state statute and the city ordinances in question providing for more restrictive age requirements to purchase cigarettes and tobacco products are prohibitory. The only difference is that the local law goes further in its prohibition. As such, these are valid exercises of a city's constitutional home rule authority.

Sincerely,



Amanda Stanley  
Legal Counsel  
The League of Kansas Municipalities





STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
ATTORNEY GENERAL

October 23, 2017

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120 SW 10TH AVE., 2ND FLOOR  
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(785) 296-2215 • FAX (785) 296-6296  
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Larry Baer, General Counsel  
League of Kansas Municipalities  
300 SW 8<sup>th</sup> Ave.  
Topeka, KS 66603-3951

Re: OR 2017-39

Dear Mr. Baer:

Our office has received the enclosed request for an attorney general opinion from State Senator Jeff Longbine, regarding whether a city ordinance or county resolution that prohibits the sale of cigarettes or tobacco products to persons under 18 years of age is valid under state law.

The inquiry and our response might fall within areas in which your organization may have expertise or an interest. In an effort to consider your position in the matter, we invite you to provide us with any information or legal arguments relating to statutes, regulations, court decisions, administrative proceedings and policy statements that you deem relevant to the issue to be addressed. If you wish to do so, please provide your input within two weeks from the date of this letter.

Please be advised that any input you provide will be subject to the Kansas Open Records Act, K.S.A. 45-215 *et seq.*

If you have or acquire knowledge of any legal or administrative proceedings pending or to be filed regarding the issues of the opinion request, please notify us immediately.

Thank you for your assistance in this matter of mutual concern.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL  
DEREK SCHMIDT

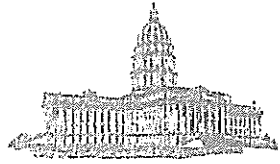
Sarah Fertig  
Assistant Attorney General

SF:sb  
Enclosure

DISTRICT OFFICE:  
2801 LAKERIDGE RD  
EMPORIA, KS 66801  
620-342-2744

State of Kansas  
Senate Vice President  
CHAIR FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE

ROOM 341-E, STATE CAPITOL  
TOPEKA, KANSAS 66612  
(785) 296-7361  
E-Mail: jeff.longbine@senate.ks.gov



JEFF LONGBINE  
SENATOR, SEVENTEENTH DISTRICT

October 18, 2017

The Honorable Derek L. Schmidt  
Attorney General of Kansas  
120 S.W. 10<sup>th</sup> Avenue  
Topeka, Kansas 66612

Dear General Schmidt:

A number of Kansas cities and counties, primarily in the eastern part of the state, have been enacting local laws prohibiting the sale of cigarettes and tobacco products to persons under the age of 21. This is in contrast to the provisions of K.S.A. 2016 Supp. 79-3321(l) which prohibits such sales to persons under the age of 18.

The state law referenced above appears to be a law uniformly applicable to all cities and counties, and I am advised that, with respect to uniformly applicable state laws, cities and counties may still enact ordinances and resolutions, respectively, through the exercise of their home rule powers, as long as the ordinances or resolutions are more restrictive than the state law and are not in conflict with it.

It also is my understanding that the courts have determined that an ordinance or resolution is in conflict with a uniformly applicable state law if the ordinance or resolution authorizes what the state law prohibits or prohibits what the state law authorizes. While the pertinent state law is prohibitory in nature (i.e., it prohibits tobacco sales to persons under 18), the fact is, under this state law, persons 18 years of age or older may lawfully purchase cigarettes or tobacco products. Whereas, under the ordinance and resolutions at issue, persons 18 years of age but under the age of 21 may not lawfully purchase cigarettes or tobacco products.

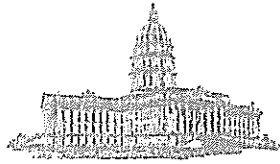
Thus, it appears that these ordinances are in conflict with the pertinent state law, because they prohibit what the state law authorizes.

Finally, I am told that supporters of these ordinances and resolutions contend that they are authorized by K.S.A. 2016 Supp. 21-6114, which states, in part:

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JEFF LONGBINE  
SENATOR, SEVENTEENTH DISTRICT

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.

The foregoing is contained in a section of the act which makes it unlawful (with certain exceptions) "to smoke in an enclosed area, or at a public meeting." However, that act does not relate to the lawful age to purchase cigarettes or tobacco products.

Based on the foregoing, I would respectfully request your opinion as to whether an ordinance of a city or resolution of a county which prohibits the sale of cigarettes or tobacco products to persons under the age of 21 is valid.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Jeff Longbine". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Jeff Longbine  
State Senator, 17<sup>th</sup> District