

ORDINANCES

Vapers' Hopes Go Up in Smoke?

by Erich R. Eiselt, Assistant General Counsel and Editor

As the summer of 2014 begins, proponents of medical marijuana, same-sex marriage, legislative prayer and concealed gun carry can justifiably point to momentum for their causes across the country. In contrast, cigarette smokers see only smoldering prospects.

They continue to lose ground, in jurisdictions large and small. In March, Hackensack, New Jersey joined a nationwide plurality, passing an ordinance prohibiting smoking (1) inside any municipal building; (2) anywhere within 35 feet of a municipal building entrance; or (3) in any public park or recreational facility owned or operated by the city. Violators of the smoke-free ordinance face stiff penalties: a $250 fine for the first offense, $500 for the second, and a punitive $1,000 for each additional infraction. According to the Global Advisory for Smokefree Policy (GASP), Hackensack joins 23 other municipalities in Bergen County with similar bans, reflecting the efforts (and funding) from the New Jersey Department of Health Office of Cancer Control and Prevention.

Hackensack is a relative newcomer to the anti-smoking party. More than 25 states and hundreds of municipalities have already passed laws prohibiting cigarette and cigar smoking in public places. But the recent Hackensack ordinance included a notable enhancement, now beginning to appear among the panoply of anti-smoking laws nationwide: it added a ban on electronic cigarettes.

Roughly the size of a traditional cigarette, the e-cig is a battery-powered cylinder that heats a mixture of liquid nicotine, propylene glycol, glycerine and flavorings. In lieu of smoke, e-cigarettes release only water vapor--hence the innocuous and sociable verb "vaping" has emerged to describe their use. As opposed to a price of $8.00 or more per pack of traditional smokes, an e-cigarette nicotine cartridge which can last roughly as long as twenty cigarettes costs only about $2.00. Allegedly, they do not produce tar or other cancer-causing toxins, delivering instead mere nicotine and flavors. They are thus purported to be a virtually harmless alternative to true tobacco, both for vapers and those in their vicinity. And for the millions of tobacco-addicted among us, they are presented as an effective means to kick the smoking habit, once and for all.

Thus far, those distinctions have allowed e-cigarettes to skirt the reach of many anti-smoking laws. As a non-tobacco product, the e-cig routinely gains entry to venues where traditional tobacco would be ostracized. And e-cigs can be marketed indiscriminately across a vast matrix of outdoor, print, cable, internet and social media-powered advertising. Sometimes they employ subtle messaging and symbology far more youth-oriented than the discredited Joe Camel ever was.

But now the prospect of a sleepy and lenient public response to e-cig makers and their vaping acolytes seems narrower than a Virginia Slim. Indeed, on April 22, 2014, the United States Food and Drug Administration announced that it intends to pass an array of regulations covering e-cigarettes. In the future, electronic cigarette manufacturers will have to produce exhaustive "New Tobacco Product Applications." And the sale of e-gig's to anyone under eighteen years of age will be prohibited.

These are moves certain to incite massive lobbying efforts from the faux tobacco industry and their anti-government allies. That assault is already underway. One free market publication recently warned, "If these regulations go into force — and that may take years — the likely outcome is a severe reduction in consumer choice, and thus fewer smokers quitting and more dying needlessly."[1] The article then revealed the effects which industry pressure has already had on the proposed FDA reg's and the constitutional ballistics which regulators will no doubt confront:

> On a more positive note, the FDA did manage to ignore the hysterics from some politicians about nicotine poisoning and child-friendly flavors ostensibly seducing young people into a lifetime of nicotine addiction and smoking. Nor did the FDA address advertising or Internet sales: both hot-button issues would have clearly approached or transgressed constitutional dicta and spurred litigation, delaying implementation for years.[2]

Obviously the federal e-cig initiative will be delayed and declawed. But localities are not waiting for Washington's K street carnival to conclude. Like Hackensack and its recent stepped-up ordinance, major cities including New York, Los Angeles and Chicago are moving rapidly. Concerned about the unsubstantiated health attributes of e-cig's, the unknown effects of second-hand faux-smoke, and the unstoppable adolescent attraction to flavored fumes and colorful high tech gadgetry, local lawmakers are increasingly construing "vaping" as just another species of smoking.

For example, last December, amidst what some would revile as a final surge in Mayor Michael Bloomberg's "Nanny State" agenda, the New York City council voted 43-8 to ban e-cig's in public. New York City's "Tobacco Product Regulation Act" (Act)[3] became effective on March 19, 2014. The Act specifically includes electronic cigarettes:

§ 17-719. Definitions:

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The Respondent asserts that Detective Koopman obtained an arrest warrant by falsifying an affidavit to create the illusion of probable cause. Pursuant to that warrant, law enforcement searched the Respondent's property and discovered a jar containing a white substance, which was initially incorrectly identified as methamphetamine. The Respondent was then arrested and he spent three days in custody. Additional tests on the substance revealed that it was not a controlled substance and all charges were subsequently dropped against the Respondent.

The Respondent brought suit under § 1983, alleging violations of the Fourteenth and Fourth Amendments. The Tenth Circuit held that a claim for malicious prosecution exists under § 1983 and that the statute of limitations began from the date the charges were dropped against the Respondent, not the date that he was arrested. Other circuits have held that the statute is tolled as the date of the arrest.

IMLA's petition-stage brief, authored by John Wilkerson of the Arkansas Municipal League, highlights the existing circuit split on this unanswered question.

Lane v. Franks, Case No. 13-483 (merits-stage *amicus* brief filed on April 9, 2014). This is the first public employment First Amendment case the Supreme Court has taken since *Garcetti v. Ceballos.* The Court will determine whether a public employee may bring a First Amendment claim for alleged retaliation against truthful sworn testimony that the employee was compelled to provide pursuant to subpoena. IMLA's brief argues that an employee who is acting as an employee and in the scope and context of employment is protected by all of the rights and benefits accorded to any employee under state and federal law, but the Constitution should not convert an employment action or dispute into a federal claim simply because the employer is a government.

IMLA's brief was authored by Matthew Delude of Primmer Piper Eggleston & Cramer, PC and was joined by the International Public Management Association for Human Resources. Oral argument was held on April 28, 2014.

City of Anaheim v. Gonzalez, Case No. ___ (petition-stage *amicus* brief to be filed on June 27). IMLA is supporting the City of Anaheim's petition in this Fourth Amendment deadly force case.

Two Anaheim police officers made a traffic stop at 2 am after observing a van driving erratically. During the course of the confrontation with the driver, a series of escalating events occurred, ultimately leading one of the officers to enter the van through the passenger door in an attempt to get the driver to comply with the commands while the other officer continued to attempt to restrain him from the driver side window. The driver then began driving away with one of the officers trapped inside the van. It was undisputed that the driver "stomped" on the accelerator to drive away. The officer trapped in the van ordered the driver to stop the vehicle and attempted to put the vehicle in neutral and to turn off the ignition, all with the driver continuing to fight him off. The officer then drew his firearm and shot the driver in the head. The officer was trapped in the van as it drove away for between 5-10 seconds.

The Ninth Circuit held because the parties disputed how fast the van was traveling at the time the officer shot and killed the driver, summary judgment was inappropriate as a reasonable jury could conclude that the use of deadly force violated the Fourth Amendment.

In a scathing dissent, Judge Trott explained that the majority's focus on the speed of the van is entirely misplaced for the purposes of the Fourth Amendment and that under well-established Supreme Court precedent, the officers' actions were objectively reasonable under the circumstances. Specifically, Judge Trott notes that the "factual dispute" relied upon by the majority - i.e., the speed of the van at the time the officer shot Gonzalez – is not a "material" fact and therefore should not have been considered in the Fourth Amendment reasonableness analysis. The dissent explains: "The law does not require an officer who immediately faces physical harm to wait before defending himself until the indication of impending harm ripens into the onslaught of actual physical injury."

T-Mobile South, LLC v. City of Roswell, Case No. 13-975 (merits-stage amicus brief to be filed August 25). IMLA is supporting the City of Roswell in this case involving the interpretation of the Telecommunications Act of 1996 (TCA). In this case, T-Mobile applied to construct a cell tower in the City of Roswell, Georgia in an area zoned as single-family residential. T-Mobile proposed constructing an "alternative tower structure" in the shape of a man-made tree that would be approximately 25-feet taller than the pine trees surrounding it. The City Council ultimately voted unanimously to deny the application. The City sent T-Mobile a brief letter saying that it denied T-Mobile's application and that T-Mobile could obtain the hearing transcript and meeting minutes, which set forth its reasons for the denial. T-Mobile claims that by failing to include the reasons for the denial in the letter, the City violated the TCA.

The TCA requires that a municipality's denial for a cell tower be "in writing." The district court and other circuit courts have held that the TCA requires a written decision and a written record that explain why the city council's majority rejected the application. The Eleventh Circuit disagreed, reasoning that the statute does not say that "the decision [must] be 'in a separate writing' or in a 'writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held' or 'in a single writing that itself contains all of the grounds and explanations for the decision.'"

While this case hinges on a technicality, the local government is faced with the possibility that if a violation of the "in writing" requirement is found, the telecommunications company would automatically be allowed to build its cell tower without further recourse by the local government. IMLA joined a State and Local Legal Center amicus brief authored by Tim Lay of Spiegel & McDiarmid. **ML**

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"Tobacco Product" shall include, but shall not be limited to, any cigar, little cigar, chewing tobacco, pipe tobacco, roll-your-own tobacco, snus, bidi, snuff, tobacco-containing shisha, or dissolvable tobacco product. Tobacco product shall also include electronic cigarettes, which are battery-operated device that contain cartridges filled with a combination of nicotine and liquid that are turned into vapor and inhaled by the user.[4]

This was only part of the council's revitalized attack on smoking generally. The Act raises the minimum age for purchase of cigarettes, electronic or tobacco, to twenty-one:

§ 17-706. Sale of cigarettes, tobacco products, or electronic cigarettes to minors and young adults prohibited.[5]

a. Any person operating a place of business wherein cigarettes, tobacco products, or electronic cigarettes are sold or offered for sale is prohibited from selling such cigarettes, tobacco products, or electronic cigarettes to individuals under **twenty-one years of age**. Sale of cigarettes, tobacco products, or electronic cigarettes in such places shall be made only to an individual who demonstrates, through a driver's license or other photographic identification card issued by a government entity or educational institution, that the individual is at least twenty-one years of age. Such identification need not be required of any individual who reasonably appears to be at least thirty years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of cigarettes, tobacco products, or electronic cigarettes to an individual under twenty-one years of age.

The Act also imposes a minimum price floor of $10.50 per pack for cigarettes sold in the City, reflecting a combined New York State and City tobacco tax of $5.85 per pack (versus the nation's lowest cigarette tax of a mere $0.17 per pack in Missouri). Driving the effective price for a single cigarette in New York City to more than fifty cents is intended to discourage—or make unaffordable—tobacco use among minors:

§17-176.1 Prohibition on the Sale of Discounted Cigarettes and Tobacco Products.

> The cigarette price floor shall be **$10.50 per packet of cigarettes**, provided that the price floor may be adjusted to account for consumer price index fluctuations in the New York – Northern New Jersey – Long Island area and for changes in taxes.[6]

Smoke- and vapor-producing products were not the only target of the revised City Council ordinances. Restrictions on chewing tobacco were also specifically tightened, and become effective May 18, 2014:

§ 17-708. Use of tobacco products on school premises prohibited. It shall be unlawful for any person to use a tobacco product, including chewing tobacco, on school premises at any time.[7]

While not moving as far as New York City, other jurisdictions have stepped up their attack on vaping. Last fall, Chicago's City Council approved a proposal to ban e-cigarette use in offices, indoor public areas and around building entrances. Los Angeles, San Francisco, Washington DC, Philadelphia and over 100 other municipalities, large and small, have all adopted similar prohibitions.

Against the protectionist surge, opponents object that there is no evidence showing e-cigarette vapor to be remotely as harmful as second-hand tobacco smoke. They also warn that vaping bans will prevent smokers from kicking the tobacco habit, undermining potential improvements in societal health. Richard Carmona, a former U.S. Surgeon General and a current board member at NJOY, one of America's largest electronic cigarette manufacturers, urged the New York City Council to reject the e-cigarette prohibitions:

"I'm extremely concerned that a well-intentioned but scientifically unsupported effort like the current proposal to include electronic cigarettes in New York's current smoking ban, could constitute a giant step backward in the effort to defeat tobacco smoking," Carmona wrote.[8]

If there is an valid argument—yet to be medically established—that taking away e-cigarettes will imperil smokers who want to quit, there is also a counter-argument. Proponents of the bans say that flooding society with e-cig's will actually spur the re-emergence of traditional smoking as an accepted norm, particularly among teens, for whom electronic cigarettes, with their confection-like flavorings and celebrity endorsers, may be a conduit to tobacco products.[9]

The rationale behind the revised Chicago ordinance, Section 4-64-091 of the Municipal Code of Chicago, includes this very argument. The recitals to the Chicago ordinance include:

> "WHEREAS, CDC Director Tom Frieden, M.D., M.P.H., has stated that "the increased use of e-cigarettes by teens is deeply troubling. Nicotine is a highly addictive drug. Many teens who start with e-cigarettes may be condemned to a lifelong addiction to nicotine and conventional cigarettes; and
> . . . .
> WHEREAS, the City of Chicago finds that e-cigarettes, with their sweet flavored cartridges, represent a calculated attempt by manufacturers to entice children and young adults to purchase and use their devices, and constitute an indirect marketing campaign which targets youth;"[10]

Effective April 2014, the Chicago ordinance prohibited the sale of e-cigarettes to minors under 18 (and the sale of less than 20 cigarettes at one time).

Whether the benefits—or dangers—of e-cigarettes are overblown will require further verification, likely at the hands of the FDA. In the interim, while municipalities may have effective means to detect and punish the sale of e-cig's to minors, they may have a harder time enforcing bans against actual e-cigarette use in prohibited places. Vapers point to a logistical challenge because there is virtually no evidence that an e-cigarette is being used, detection and enforcement will be no easy matter.

They may have a point. At a recent hearing in Philadelphia on the subject of vaping, a member of the National Vapers Club testified before the committee that he had just sat through two hours of public comment, using his e-cigarette 20 or 25 times, "and no one noticed."[11]

Notes

1. http://american.com/archive/2014/may/new-fda-e-cigarette-regulations-killing-an-industry-killing-smokers (last accessed May 15, 2014).
2. *Id*
3. New York, Ny., Admin. Code art. 17-b16-17-626 (2006).
4. *Id*
5. *Id*
6. *Id*
7. *Id*
8. http://www.reuters.com/article/2013/12/19/us-usa-ecigarettes-newyork-idUSBRE9BI0JM20131219 (last accessed Mar. 22, 2014).
9. http://www.huffingtonpost.com/2014/04/29/e-cigarette-bans_n_5234027.html
10. Chicago, Il., Code § 4-64-091 (1990).
11. http://www.philly.com/philly/news/politics/20140314_City_Council_committee_moves_to_restrict_e-cigarettes.html#6zLxvjy0HTOlzRtf.99 (last accessed Mar. 15, 2014).