WD70576

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CITY OF KANSAS CITY,

Respondent,

vs.

GEORGIA JEAN CARLSON,

Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Richard T. Standridge, Associate Circuit Judge
Case No. 0816-CR06724

REPLY BRIEF OF THE APPELLANT

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In her opening brief, Appellant demonstrated how Respondent's Ordinance No. 080073 ("the Ordinance"), which declares JC's Sports Bar to be a "public place" and totally prohibits her from allowing any smoking anywhere therein, conflicts with the governing Missouri statute regulating smoking indoors, the Indoor Clean Air Act, §§ 191.765 through 191.777, R.S.Mo., ("ICAA"), and thus is preempted and void.

Appellant explained that this is because § 191.769, R.S.Mo., expressly declares that bars and billiard parlors like JC's Sports Bar are "not considered a public place" for the purposes of smoking regulation in Missouri. *Amicus Curiae* General Cigar Holdings, Inc. ("General Cigar"), showed that the same is true for its tobacco store clients. The arguments of both Appellant and General Cigar are rooted in § 71.010, R.S.Mo., the longstanding statute providing that, to be valid, any municipal ordinance must be "in conformity with the state law upon the same subject."

In response, Respondent fails to address § 71.010 and its doctrine of conflict preemption at all. Respondent instead muddles that issue by discussing the separate and irrelevant doctrines of "express preemption" and "field preemption." Respondent's only other substantial response is to attempt to change the language of two sections of the ICAA, § 191.767.2, contemplating ordinances prohibiting smoking in "public places," and § 191.777, allowing cities to pass more stringent ordinances on smoking in schools and child daycare facilities, into express grants of municipal power to prohibit smoking in the bars and billiard parlors "not considered a public place."

Respondent's arguments are without merit. For the Court to accept Respondent's position, it would have to disregard the facts of this case, including Respondent's own judicial admissions, and the law of Missouri pertaining to both conflict preemption and statutory construction. The Court should not be persuaded by Respondent's confusion of the issue in this case or by its insertion of absent wording into statutes.

I. The issue on appeal is whether the Ordinance is preempted for conflict with state law under § 71.010, not "express preemption" or "field preemption," which in Missouri are entirely separate questions.

The question presented in this case is whether, under § 71.010, R.S.Mo., Respondent City of Kansas City can prohibit certain areas from allowing any smoking indoors at all when the state law on the same subject specifically exempts those areas from indoor smoking regulation. Appellant and General Cigar explained extensively how for the past 120 years, any municipal ordinance prohibiting something that a state law on the same subject expressly or implicitly permits conflicts with that state law and, therefore, violates § 71.010 and is preempted and void.

This principle is known as "conflict preemption." Miles Coleman, *Banning the Flames: Constitutionality, Preemption, and Local Smoking Ordinances*, 59 S.C. L. REV. 475, 480-81 (Spring 2008). It differs from the other two forms of preemption: (1) "express preemption" – when a state law includes "an explicit statutory statement that no subordinate governmental authority may interfere with the statutory scheme;" and (2) "field preemption" – "when a statutory scheme is so pervasive that it leaves no room for a state or municipality to supplement it." *Id.* Unlike the other two forms of preemption,

conflict preemption is not based on the express text of a statute or how pervasively it regulates its field. *Id.* Instead, it stems from what happens when the effect of a state law clashes with the effect of a local law, specifically the paradox encountered "when compliance with both the state and the local law is impossible." *Id.*

In Missouri, whether an ordinance conflicts with state law is entirely a separate question from whether the state law expressly preempts local ordinances concerning its subject or is so pervasive that it preempts the entire field that it concerns. *Page W., Inc. v. Cmty. Fire Prot. Dist. of St. Louis County*, 636 S.W.2d 65, 67 (Mo. banc 1982). That is, a local ordinance might not be expressly preempted by a state statute on the same subject and the statute might not preempt its whole field, but the ordinance still might conflict with the statute. *Id.* This is because, no matter what a particular state statute may or may not say, § 71.010 applies to *all* state laws and *all* municipal ordinances. *City of St. Louis v. Stenson*, 333 S.W.2d 529, 535 (Mo. App. 1960).

Page Western provides a good example of how, in Missouri, conflict preemption is an independent issue from the other forms of preemption. In that case, St. Louis County had enacted a regulation prohibiting the retail sale of gasoline through self-serve pumps. 636 S.W.2d at 65. Arguing several theories of preemption, a group of gasoline retailers sought a declaratory judgment that the state law regulating retail gasoline sales preempted the County's regulation. *Id.* at 66. The Supreme Court held that although the state law regulating gasoline sales did not expressly preempt local governments from regulating that field, and although the state law was not so pervasive that it preempted the entire field of gasoline sales regulation, the County's ordinance nonetheless conflicted

with the relevant state law by prohibiting what it implicitly permitted, and was preempted and void. *Id.* at 67-68. The Court stated that each form of preemption is an independent question governed by its own test. *Id.* at 67. If an ordinance fails any one of the separate tests, it is invalid. *Id.*

Respondent makes no mention of either § 71.010 or its resultant bright-line test: "If a local law either prohibits what state law allows, or allows what state law prohibits, then a local law is in conflict with the state law and, therefore, preempted." *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo. App. 1999). Instead, as Appellant and General Cigar predicted (Brief of Appellant 34; Brief of *Amicus Curiae* 14), Respondent attempts to turn this case into one of "express preemption" or "field preemption." Both Appellant and General Cigar agree that the Ordinance is not preempted under those other doctrines. (Br. of Appellant 34-35; Br. of *Amicus* 14-15).

But Respondent goes so far as to suggest that an express declaration of preemption is the *only* way a state law can preempt an ordinance (Brief of Respondent 10-11). Not only does this unsupportable argument ignore § 71.010, but it also disregards the profusion of cases Appellant and General Cigar cited wherein ordinances were invalid under § 71.010 for conflict with a state law even though the state law neither expressly preempted anything nor occupied its field of regulation. A particular statute like the ICAA need not expressly preempt municipal regulation of the subject matter or occupy the field of regulation for an ordinance to be invalid for conflict with it. Section 71.010 already provides a general, overarching state policy enjoining disharmony between ordinances and statutes that applies to every statute and every ordinance.

The Court should not be swayed by Respondent's disingenuous confusion of the issue on appeal. This case is about conflict preemption. The question before the Court is whether the Ordinance declaring JC's Sports Bar to be a "public place" and prohibiting Appellant from allowing any smoking inside JC's Sports Bar is invalid under § 71.010 because it conflicts with § 191.769's declaration that JC's Sports Bar is "not considered a public place" and thus is free from smoking regulation.

II. Because § 191.769 expressly excludes JC's Sports Bar from the ICAA's definition of "public place" where smoking is regulated, the Ordinance re-injecting it into the sphere of regulation by redefining it as a "public place" impermissibly conflicts with state law.

Respondent argues that in § 191.769, "the state has not authorized smoking in bars, but has simply excluded bars … from the definition of a public place." (Br. of Respondent 12). Apparently, Respondent believes that, rather than permitting applicable bars and billiard parlors to maintain no nonsmoking areas indoors, § 191.769(5) "just puts those bars outside the scope of the statute and leaves smoking in them unregulated" (Br. of Respondent 8).

Only if the General Assembly had left any mention of "bars … and billiard parlors, which conspicuously post signs stating that 'Nonsmoking Areas are Unavailable,'" that "are not considered a public place" out of the ICAA might Respondent be correct that the State does not regulate smoking in such places. But that is not the case. Section 191.769 affirmatively provides Missouri's policy on the subject of allowing smoking inside bars and billiard parlors: by their proprietors posting

conspicuous signs stating "Nonsmoking Areas are Unavailable," the establishments are exempt from the definition of "public places" subject to smoking regulation. If the proprietor chooses to post the required sign, she is permitted to allow smoking indoors freely, just like the "private residences" included in the same class.

When a specific thing is expressly exempted from a state law's regulated class, a municipal ordinance attempting to reinsert the thing back into the class and subject it to the same or greater regulation from which the State excludes it is inconsistent with the state law, in violation of § 71.010. While a city may have the power to "take 'A' and subject it to stricter regulations, … it cannot change 'A' into 'B,' particularly when the state has specifically defined 'A' to exclude 'B.'" (Br. of *Amicus* 14).

In *City of St. Louis v. Meyer*, a farmer was convicted and fined for peddling without a license in violation of a St. Louis ordinance because he had sold his agricultural products on the city's streets without first obtaining a peddler's license from the city. 84 S.W. 914, 914 (Mo. 1904). The ordinance defined a "peddler" as "Every person who shall deal in the selling of patent, or other medicines, goods, wares and merchandise, except books, charts, maps, and stationery." *Id.* at 916. Conversely, the State defined a "peddler" as "Whoever shall deal in the selling of patent rights, patent or other medicines, lightning rods, goods, wares and other merchandise, *excepting* pianos, organs, sewing machines, books, charts, maps, stationery, *agricultural and horticultural products, including milk, butter, eggs and cheese*, by going about from place to place to sell same …" *Id.* at 917 (emphasis added).

On appeal, the farmer argued that St. Louis's "peddler" ordinance conflicted with the state law on the same subject. *Id.* at 916. Like Respondent, St. Louis countered that the terms of the state statute defining "peddler" "should be limited to a manifestation of [the State's] policy as to subjects … for state purposes only," that the state statute did not expressly preempt cities from redefining "who are or who are not peddlers," and that it was free to define "peddler" differently than the State because "no prohibitory terms are used in the statute against municipalities exacting a peddler's license from the class of persons embraced within the exception to the statute." *Id.* at 917.

The Supreme Court rejected St. Louis's arguments. *Id.* The Court held that if "the state, by a general enactment of the Legislature, [has] manifested a policy upon the character of business in which [the farmer] was engaged," then under § 6258, R.S.Mo. (1899) (today § 71.010), "the city of St. Louis is restricted to the exercise of only such jurisdiction as is consistent with and in harmony with the policy of the state so manifested." *Id.*

> The state statute defining "peddler" as excluding persons like the farmer was a general law treating of the subject of peddlers and the method of licensing them to transact their business. This general law is applicable to every citizen of the state, and its force and vitality cannot be limited by municipal authority. The municipal corporation is powerless, by definition or otherwise, to embrace in an ordinance a class of persons as peddlers, and subject them to penalties for the violation of this ordinance, who by a

> general law of the state are within the exception of the terms of the statute defining the class who are in fact peddlers.

Id.; *see also City of Moberly v. Hoover*, 67 S.W. 721, 721-22 (Mo. App. 1902) (same).

Meyer is directly on point. The ICAA is a general law on the subject of indoor smoking. In § 191.769(5), the State has manifested a policy upon the character of business of which JC's Sports Bar is engaged. This policy is applicable throughout Missouri, and its force and vitality cannot be limited by municipal authority. As such, under § 71.010, Respondent is restricted to the exercise of only such jurisdiction as is consistent with and in harmony with the policy of the State so manifested. Respondent is powerless, by definition or otherwise, to embrace in the Ordinance a class of places as "public places" for smoking regulation and subject them to penalties for violating the Ordinance, which by § 191.769(5) are within the exception of the terms of the ICAA defining the class that are in fact "public places." Because the Ordinance attempts to make a "public place" of a bar or billiard parlor posting conspicuous signs stating "Nonsmoking Areas are Unavailable," it is out of harmony with the provisions of the state law on the same subject, in violation of § 71.010.

In *City of Lake Lotawana v. Meagher*, a defendant was convicted of violating a city's water traffic ordinance while on a lake owned by a private corporation. 581 S.W.2d 105, 106 (Mo. App. 1979). The ordinance prohibited certain acts during the use of the private lake. *Id.* A state statute, however, "specifically excepted" "bodies of water owned by 'a person, corporation, association, partnership, municipality or other political subdivision'" from the definition of "waters of this state" subject to water traffic

regulation. *Id.* This Court held that because "the only legislative enactment on the subject … expressly excepts privately owned lakes from such regulation," it therefore was "obvious" that the ordinance conflicted with the statute, and the ordinance was invalid. *Id.*

The necessary result of this case is equally obvious. The Ordinance declares that JC's Sports Bar is a "public place" and thereby both prohibits a person in control of JC's Sports Bar from allowing smoking and requires that the entire establishment be a nonsmoking area. In § 191.769, the ICAA, the only state enactment regulating smoking indoors, expressly excepts places like JC's Sports Bar from such regulation by declaring that they "are not considered a public place." The Ordinance therefore conflicts with § 191.769 and must be held invalid.

Appellant and General Cigar also illustrated this principle by discussing *City of St. Louis v. Klausmeier*, 112 S.W. 516 (Mo. banc 1908), and *Stenson*, 333 S.W.2d at 529.[1]

[1] Respondent asserts that Appellant also "relies on … *Crackerneck Country Club, Inc. v. City of Independence*," 522 S.W.2d 50 (Mo. App. 1974), as part of this illustration. Appellant did *not* mention that case in her opening brief. Respondent is correct that, in *Crackerneck*, Independence invalidly prohibited what a state licensing statute permitted, and the ICAA is not on its face a licensing statute. Conflict preemption under § 71.010, however, is not merely about a city prohibiting something the state has "licensed," but rather is invoked when a locality prohibits something in any way permitted by the "expressed or implied provisions" of a state statute. *Page W.*, 636 S.W.2d at 67.

(Br. of Appellant 17-19; Br. of *Amicus* 18-19). Respondent attempts to distinguish those cases as involving a "state law or regulation that specifically licensed or authorized conduct which the municipality sought to prohibit." (Br. of Respondent 12).

But by admitting that the state statutes in those cases effected an authorization, Respondent negates its own argument about § 191.769. In the same manner in which Respondent admits that "state law authorized the sale of dairy products within the state which met a minimum allowable content of milk solids" in *Klausmeier* and "authorized the operation of tractor trailer trucks less than 45 feet in length on public highways" in *Stenson*, § 191.769 authorizes bars and billiard parlors like JC's Sports Bar to maintain no indoor nonsmoking areas. The law in *Klausmeier* permitted the sale of all skimmed milk containing at least 9.25% milkfat by exempting it from the sphere of dairy regulation. The law in *Stenson* permitted the operation of trucks 45 feet or less in length by exempting them from the sphere of vehicle length regulation. Section 191.769 permits the free allowance of smoking indoors in applicable bars and billiard parlors by exempting them from the sphere of indoor smoking regulation.

Respondent additionally suggests that the Ordinance "simply enlarges upon the provisions of the [ICAA]…" (Br. of Respondent 11). Appellant and General Cigar already showed how Respondent's absolute prohibition of allowing smoking anywhere inside JC's Sports Bar and tobacco stores is not a "supplement or enlargement" on § 191.769. (Br. of Appellant 42-43; Br. of *Amicus* 14-15). Appellant believes that Respondent possibly has the authority to enact an ordinance placing additional regulations on places like JC's Sports Bar for them to allow smoking freely, such as

requiring them obtain a special local license or requiring that they post additional signage (Br. of Appellant 42).

But the "power to license and regulate does not include the power to prohibit." *City of Meadville v. Caselman*, 227 S.W.2d 77, 80 (Mo. App. 1950). The Ordinance defines JC's Sports Bar as a "public place" so as to *prohibit* Appellant and her employer from allowing *any* smoking therein *at all* (Br. of Respondent 16). The State provides that JC's Sports Bar is "not considered a public place", such that its owner is permitted to maintain no nonsmoking areas indoors. Respondent's Ordinance "attempt[ing] to prohibit precisely what state regulation permits" thus "involves more" than a supplement or enlargement on state law. *Page W.*, 636 S.W.2d at 68. Instead, it is void and unenforceable for conflict with the state law on the same subject. *Id.*

It bears note that Respondent's assertion that § "191.769 is a prohibitory, rather than a permissive statute" (Br. of Respondent 13) is exactly contrary to the position it took before the trial court. Respondent and Appellant entered into a stipulation as to all the material facts of the case, in which they agreed that the owner of JC's Sports Bar maintained "no non-smoking areas at all in JC's Sports Bar, because Missouri's statewide Clean Indoor Air Act, §§191.765 through 191.777, R.S.Mo., *permits* her not to." (Legal File 99, ¶ 5) (emphasis added). Subsequently, Respondent reconfirmed that § 191.769 permits Appellant to allow smoking freely inside JC's Sports Bar: "The Defendant is correct that *the ICAA allows the defendant to permit smoking in her bar*, but smoking is *'permitted'* only because bars … are not covered by the provisions of the ICAA." (Supplemental Legal File 2-3) (emphasis added).

Now, however, Respondent hypocritically asserts the opposite. In Missouri, "When parties agree as to certain facts and enter into a stipulation, they cannot be heard to say on appeal that the facts were other than those stipulated. Such a stipulation is a judicial admission constituting an abandonment of any contention to the contrary." *Sears, Roebuck & Co. v. Hupert*, 352 S.W.2d 382, 385 (Mo. App. 1961). This principle applies equally to admissions of how the material facts apply to the relevant law as they do to bare statements of fact. *Royston v. Watts*, 842 S.W.2d 876, 877 (Mo. App. 1992). As such, beyond being wholly unsupportable under the law of Missouri, the Court should disregard Respondent's heretofore abandoned contentions raised for the first time on appeal that are contrary to its judicial admissions before the trial court.

Respondent's references to tobacco smoke as "pollution" and "contamination" (Br. of Respondent 5, 15) demonstrate that it does not like smoking in places like JC's Sports Bar and would prefer to keep all such places in its jurisdiction from allowing any smoking indoors whatsoever. Because Respondent does not like the idea of smoking being allowed inside such places, it seeks to replace the State's standards, as outlined in the ICAA, with its own standards. But,

> however laudable may be such efforts of the [City], the stark reality of the situation is that there is a general law on the subject of [smoking indoors]. And the general law specifically and expressly approves and authorizes [applicable bars and billiard parlors] throughout the state [to allow smoking indoors freely]. In effect, [Respondent] by its ordinance has attempted to prohibit precisely what the legislature has explicitly said may be done.

State ex rel. Burnau v. Valley Park Fire Prot. Dist. of St. Louis County, 477 S.W.2d 734, 736 (Mo. App. 1972).

Section 71.010 enjoins Respondent from doing this. Its Ordinance declaring JC's Sports Bar and places like it to be "public places" and prohibiting them from allowing any smoking indoors directly conflicts with § 191.769, in which the State of Missouri expressly declares that those places "are not considered a public place" and are free from indoor smoking regulation.

III. Sections 191.767.2 and 191.777 cannot be read to grant cities the power to reinsert the places in § 191.769 back into the sphere of smoking regulation.

Respondent's only other argument is to suggest that the ICAA's §§ 191.767.2 and 191.777 function as anti-preemption clauses giving it the power to prohibit "smoking in areas where the [ICAA] allowed it." (Br. of Respondent 8). Not only is this out of step with both Respondent's new contention that the ICAA is purely prohibitory and does not allow anything, but also the plain language of those clauses cannot possibly be construed to provide this.

a. § 191.767.2.

Appellant and General Cigar both discussed § 191.767.2 extensively (Br. of Appellant 31-34; Br. of *Amicus* 22). This clause provides that "A smoking area may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation." *Id.*

As Respondent correctly notes, the law of Missouri is that "'every word, clause, sentence, and provision of a statute' must have effect." *Civil Serv. Comm'n of the City of St. Louis v. Bd. of Aldermen of the City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003) (quoting *Hyde Park Housing P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)). But then Respondent entirely abandons this basic rule. Respondent argues that § 191.767.2 means "smoking may be permitted by bar owners 'except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation.'" (Br. of Respondent 12).

The plain, unambiguous text of that clause does not say "smoking may be permitted by bar owners." Instead, it begins, "A smoking area may be designated by persons having custody or control of *public places* …" (Emphasis added). "[I]t will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Civil Serv. Comm'n*, 92 S.W.3d at 788 (quoting *Hyde Park*, 850 S.W.2d at 84). Respondent seeks to write the phrase "public places" out of § 191.767.2. Under § 191.769, like private residences, bars and billiard parlors like JC's Sports Bar – and tobacco stores like General Cigar's distributees – "are not considered a public place." The express subject of § 191.767.2 is the designation of smoking areas in "public places." The ICAA's language that the owner of a public place may designate a smoking area on its face cannot apply to places listed in §191.769.

Respondent further suggests that Appellant and General Cigar's arguments render § 191.767.2 "utterly meaningless." (Br. of Respondent 7, 14). But Appellant and General Cigar both cogently explained what the plain language of that clause

unmistakably means: "a smoking area may be designated in public places, unless other law or ordinance prohibits it." (Br. of *Amicus* 22). It "adds a qualifier that, in public places – those areas that the ICAA requires to maintain at least 70% of their enclosed area as nonsmoking in the first place – smoking might be prohibited by a municipal ordinance …" (Br. of Appellant 32).

Section 191.767.2, contemplating ordinances prohibiting smoking in public places, cannot reasonably be read as an express grant of power to cities to ignore § 71.010 and prohibit persons in control of places explicitly "not considered a public place" from allowing any smoking anywhere indoors at all. Respondent's argument otherwise ignores and circumvents the plain language of § 191.767.2.

b. § 191.777

Equally unreasonable is Respondent's contention that § 191.777, the ICAA's second anti-preemption clause[2] granting localities the power to enact more stringent

[2] Respondent fails to mention the anti-preemption clause in S.B. 509, 86th Gen. Assem., Reg. Sess. (Mo. 1992), the original instrument enacting the portions of the ICAA at issue in this case. Section 14 of S.B. 509 provided, "Nothing in sections 7 to 14 of this act shall prohibit local political subdivisions from enacting more stringent ordinances or rules." The indoor smoking regulations were sections 1 through 5 of S.B. 509. In her opening brief, Appellant explained the preclusive effect of S.B. 509 limiting its anti-preemption clause to other portions besides its indoor smoking regulations. (Br. of Appellant 28-30).

ordinances on smoking in schools and child daycare facilities, also gives it the power to enact an absolute prohibition on allowing smoking in bars and billiard parlors like JC's Sports Bar. That section states, "Nothing in Sections 191.775 and 191.776 shall prohibit local political subdivisions or local boards of education from enacting more stringent ordinances or rules."

Like the term "public places" in § 191.767.2, the reference in § 191.777 to "Sections 191.775 and 191.776", which concern smoking in schools and child day care facilities, is not idle verbiage or superfluous language. Respondent would read this statute as not mentioning those sections, but instead as stating, "Nothing *in the Indoor Clean Air Act* shall prohibit local political subdivisions or local boards of education from enacting more stringent ordinances or rules." Section 191.777 plainly does not say this. The General Assembly limited the grant of municipal power in § 191.777 to regulations on smoking in schools and child daycare facilities.

Section 191.777 cannot be construed either to cover §§ 191.765 through 191.773, or to validate the Ordinance with respect to its absolute prohibition on allowing smoking in JC's Sports Bar, which is neither a school nor a child daycare facility.

IV. City of Kansas City Ordinance No. 080910

Respondent argues that General Cigar's related argument as to tobacco stores "is moot in that on September 25, 2008 by Ordinance Number 080910 the ordinance was

amended to exempt tobacco stores…" (Br of Respondent 15). In its Statement of Facts,[3] Respondent states, "The ordinance prohibiting smoking in public places was amended on September 25, 2008 by Ordinance Number 080910 (amending §34-475(d)) to permit smoking in tobacco stores so long as steps are taken to prevent the pollution of air within buildings shared by other tenants …" (Br. of Respondent 5).

In Missouri, "A court may not take judicial notice of the existence or contents of city or county ordinances." *Consumer Contact Co. v. State*, 592 S.W.2d 782, 785 (Mo. banc 1980). This rule applies equally to ordinances proffered by a respondent as it does to those by an appellant. *Id.* at 786. It also applies equally to appellate courts as it does to trial courts. *City of Univ. City v. MAJ Invest. Corp.*, 884 S.W.2d 306, 307 (Mo. App. 1994). On appeal, "mere reference to the chapter and section of [a] city's code [are] inadequate; the record must contain the ordinances themselves." *Id.* Moreover, "A party's brief shall contain or be accompanied by an appendix containing the following materials, unless the material has been included in a previously filed appendix: … (2)

[3] Nowhere in its Brief, either in its Statement of Facts or in its Argument, does Respondent include any page references to the Legal File at all, even when quoting from trial court orders in the Record (Br. of Respondent 10-11) or discussing the language of its ordinances. (Br. of Respondent 5, 15). This blatantly violates Rule 30.06(e): "All statements of fact and argument contained in any brief shall have specific page references to the legal file or the transcript." The Court would not be remiss in striking Respondent's Brief.

The complete text of all … *ordinances* … claimed to be controlling as to a point on appeal." Rule 84.04(h) (emphasis added).

Respondent has ignored all of these requirements. No copy of Ordinance No. 080910 is in the Record, and Respondent does not include it in an appendix. Instead, Respondent merely references its chapter, section, and ordinance number without quoting any of its text or providing a copy of it. The Court cannot take judicial notice of that ordinance, and properly should disregard Respondent's inadequate discussion of it.

Alternatively, were the Court to consider Ordinance No. 080910, Appellant would point out that it in no way fits Respondent's notion that it "permit[s] smoking in tobacco stores so long as steps are taken to prevent the pollution of air within buildings shared by other tenants." (Br. of Respondent 5). Section 191.769(4) permits "A place where more than *fifty percent* of the volume of trade or business carried on is that of the blending of tobaccos [*etc.*]" to allow smoking indoors freely. (Emphasis added). Ordinance No. 080910 exempts "business establishments where more than *eighty percent (80%)* of the volume of trade or business carried on is that of the blending of tobaccos, [*etc.*] …, provided that" (1) the establishment either is in its own, separate building or otherwise has a separate HVAC system from its neighbors, and (2) prohibits persons under 18 years of age from the portion where smoking is allowed. (Emphasis added).

Counsel for General Cigar has informed Counsel for the Appellant that while all three of General Cigar's clients in Kansas City meet § 191.769(4), none of them meet the terms of the supposed exemption in Ordinance No. 080910. As such, General Cigar's

related question as to whether the Ordinance's prohibition on tobacco stores allowing smoking indoors conflicts with the ICAA cannot be moot.

Moreover, at the time of Appellant's alleged offense, Ordinance No. 080910 had not yet been enacted. In a criminal case, the law at issue is "the law that existed at the time of the offense." *State v. Edwards*, 983 S.W.2d 520, 521 (Mo. banc 1999). Appellant's alleged offense was on July 18, 2008, and Ordinance No. 080910 was not enacted until the following September. Respondent's mentioning of Ordinance No. 080910 is as irrelevant as it is inadequate.

Conclusion

This Court should reverse the trial court's judgment of conviction and sentence against Appellant Georgia Jean Carlson for violating City of Kansas City Ordinance No. 080073, which is preempted and invalid because it conflicts with the state law on the same subject, in violation of § 71.010, R.S.Mo.

Respectfully submitted,

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Certificate of Compliance

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Certificate of Service

I hereby certify that on April 9, 2009, I mailed a true and accurate copy and CD-ROM of this Reply Brief of the Appellant to the following:

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