



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 89

The Honorable Jessie M. Branson
State Representative, Forty-Fourth District
800 Broadview Drive
Lawrence, Kansas 66044-2423

Re: Crimes and Punishments--Crimes Involving Violations
of Personal Rights--Smoking in a Public Place

Synopsis: Penal statutes must be strictly construed. Since 1987 House Bill No. 2412 is penal in nature, the language granting total discretion must be given its ordinary meaning. Therefore, the proprietor or person in charge of the premises is free to designate any percentage of the premises as a smoking area, subject only to the limitations of any existing local regulation which are at least as stringent as those imposed by the act. Cited herein: 1987 House Bill No. 2412.

* * *

Dear Representative Branson:

As state representative for the forty-fourth district, you request our opinion concerning 1987 House Bill No. 2412 (to be codified at K.S.A. 1987 Supp. 21-4008 through 21-4014) which regulates smoking in public places and at public meetings. Specifically, you inquire whether a proprietor or person in charge of a public place could designate 100% of the premises as a smoking area under the new law.

Reference to non-smoking areas is made in Section 2(c) of the bill, which states:

"Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas." (Emphasis added.)

This section would seem to imply that any time there is a smoking area designated, there must be some adjacent non-smoking area on the premises.

However, Section 3 of the bill states in relevant part:

"The proprietor or person in charge of the public place shall have the authority to establish the percentage of area in the public place which shall be posted and designated as a smoking area."

The Supreme Court of Kansas in the recent case of State v. Thompson, 237 Kan. 562, 566 (1985), reviewed the rules of construction of penal statutes:

"Penal statutes must be strictly construed in favor of the persons sought to be subject to them. The rule of strict construction simply means ordinary words are to be given their ordinary meaning. The statute should not be read to add that which is not readily found therein or to read out what, as a matter of ordinary English language, is contained therein. A statute should never be given a construction that leads to uncertainty, injustice or confusion, if it is possible to construe it otherwise. In construing a statute, words and phrases should be construed according to the context, and the approved usage of the language and words in common use are to be given their natural and ordinary meaning. State v. Dubish, 234 Kan. 708, 675 P.2d 877 (1984)."

1987 House Bill No. 2412 is penal in nature. Section 4 of the bill sets forth penalties for violations of the act. Though there is not a penalty prescribed for designating an improper percentage of area in a public place as a smoking area, the bill as a whole is penal and therefore must, as a whole, be

strictly construed. General Foods Corp. v. Priddle, 569 F.Supp. 1378 (D.C. Kan. 1983). Additionally, all sections of the bill are to be placed in the criminal code, further indicating the appropriateness of strict construction.

In our opinion, the implication left by a reading of section 2(c) of the bill would lead to uncertainty and confusion as to the percentage of the area of the premises that a proprietor must designate as a non-smoking area. Additionally, the plain language of section 3 buttresses our opinion that complete discretion is left to the proprietor or person in charge of the premises. Without any words of limitation appearing in the language of the statute, the language granting total discretion must be given its ordinary meaning. Therefore, the proprietor or person in charge of the premises is free to designate any percentage of the premises as a smoking area.

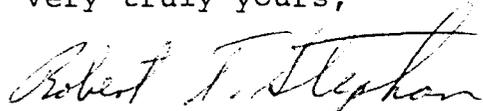
It should be noted, however, that section 5 of the bill provides for regulation of smoking by local units of government within their boundaries. Therefore, although there are no statewide restrictions on the percentage of public areas which may be designated as smoking areas, any more stringent local regulation would control.

Additionally, we believe that the purpose of the bill was to encourage, if not mandate, at least some percentage of the premises as non-smoking areas in all public places. The intent of the legislature, although not evident on the face of the bill, was to force proprietors to make a conscious effort if they wish to permit smoking on their premises. However, because of the penal nature of the statute, rules of statutory construction do not allow us to consider this intent in our consideration.

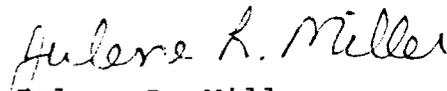
In conclusion, penal statutes must be strictly construed. Since 1987 House Bill No. 2412 is penal in nature, the language granting total discretion must be given its plain meaning. Therefore, the proprietor or person in charge of the premises is free to designate any percentage of the premises

as a smoking area, subject only to the limitations of any local regulation which is at least as stringent as that imposed by the act.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm