STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN THE MATTER OF:

Court of Appeals File No. 217232

MICHIGAN RESTAURANT ASSOCIATION and TEAM LANDMARK, INC.; MARQUETTE MOUNTAIN FOOD & BEVERAGE CORP.; PARK THIRD, INC.; STARBURST CORP.; OFFICE LOUNGE INC.; TIROLER HOF INN, INC., and MICHIGAN CHAMBER OF COMMERCE,

Circuit Court Case No. 98-35362-CZ

Plaintiffs/Appellees,

v.

CITY OF MARQUETTE,

Defendant/Appellant.
_____/

BRIEF FOR *AMICUS CURIAE* MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT/APPELLANT

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF INTEREST

This Brief *Amicus Curiae* is submitted on behalf of the Michigan Municipal League. The League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. The League consists of some 516 Michigan cities and villages. The League operates the Michigan Municipal League Legal Defense Fund through a Board of Directors. Approximately 380 of the League's member cities and villages are also members of the Legal Defense Fund. The purpose of the Legal Defense Fund is to represent member cities and villages in litigation of state-wide significance.

This brief is authorized by the Board of Directors of the Legal Defense Fund whose membership includes: The president and executive director of the Michigan Municipal League and the officer and directors of the Michigan Association of Municipal Attorneys: Phillip A. Balkema, city attorney, Grand Rapids; William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Herold Deason, city attorney, Grosse Pointe Park; Catherine R. Ginster, city attorney, Saginaw; Andrew J. Mulder, city attorney, Holland; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; and William C. Mathewson, general counsel, Michigan Municipal League.

The Court authorized the filing of this brief by Order certified on June 30, 1999.

STATEMENT OF THE BASIS OF JURISDICTION

Amicus Curiae Michigan Municipal League adopts the Statement of the Basis of Jurisdiction of Defendant/Appellant City of Marquette.

QUESTION PRESENTED

Amicus Curiae Michigan Municipal League adopts the question presented as stated by Defendant/Appellant City of Marquette.

STATEMENT OF FACTS

Amicus Curiae Michigan Municipal League adopts the Statement of Facts of Defendant/ Appellant City of Marquette.

ARGUMENT

I. INTRODUCTION

This preemption issue arises in the context of important principles of public policy and statutory construction. The first of these is the board recognition and liberal construction of municipal police power authority under the Michigan Constitution and laws. The second is the public health considerations underlying the Marquette ordinance. Contrary to appellees' arguments (Brief at 1), this case is about the powers of Home Rule Cities because the trial court failed to observe and follow the constitutional mandate of liberal construction in favor of cities; and this case is about harm from second hand smoke and the public health considerations of curtailment of smoking in restaurants, which are central to a determination of the intent of the Legislature. Appellees' position stands the legislation and the intent of the Legislature on its head by assuming that the statute was designed to enable and protect smoking in food establishments.

II. LIBERAL CONSTRUCTION OF THE STATUTE IN THE CITY'S FAVOR IS MANDATED BY THE CONSTITUTION, THE HOME RULE CITIES ACT AND THE PUBLIC HEALTH CODE.

Article 7, § 34 of the 1963 Constitution provides that:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor . . . .

The Michigan Supreme Court has referred to this provision as a "constitutional mandate." *Rental Property Owners Ass'n of Kent County v. City of Grand Rapids*, 455 Mich 246, 256; 566 NW2d 514 (1997).

The record of the 1961 Constitutional Convention emphasizes that this requirement of favorable construction for the benefit of cities is a directive to the courts and applies across the board to all statutes concerning municipalities.

> The intent of this section is to mandate the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Constitutional Convention, 1961, Official Record, p 1048.

See Square Lake Hills Condominium Association v. Bloomfield Township, 437 Mich 310, 319; 471 NW2d 321 (1991) and *Inch Memorials v. City of Pontiac*, 93 Mich App 532; 286 NW2d 903 (1979) holding that the provisions of the Home Rule Cities Act, MCL 117.1 *et seq.* must be liberally construed in favor of municipalities. Specifically, and for purposes of this case, this means that the court should construe § 12905 of the Public Health Code, MCL 333.12905; MSA 14.15 (12905) in favor of the validity of Marquette's police power ordinance if it is not clearly inconsistent with the language of the statute.

Municipal authority under Michigan law flows from Const. 1963, Art. 7, § 22, which provides that a city "shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law."

Marquette is a Home Rule City and derives its powers, including its police powers, from this constitutional provision and from the Home Rule Cities Act, MCL 117.1 *et seq.*, MSA 5.2071 *et seq.* The Constitution requires that the Home Rule Cities Act be given a liberal construction in favor of municipal ordinances, and the Constitution and the Home Rule Cities Act provide the framework within which the court should conduct its review of the ordinance at issue here.

The Marquette ordinance is an expression and implementation of the City's police power authority. The police power of a Home Rule City has the same scope and nature as that of the state. *People v. Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945). The exercise of home rule powers is presumed to be valid. *Woodward Ave Corp. v. Wolff*, 312 Mich 352, 357; 20 NW2d 217 (1945). The Marquette ordinance is also a public health measure. In reviewing a holding that such an ordinance is preempted by a provision of the Public Health Code the court should also be guided by the statutory mandate of liberal construction in favor of the public health and welfare set forth in MCL 333.1111; MSA 14.15(1111):

> This code shall be liberally construed for the protection of the health, safety and welfare of the people of this state.

Every applicable constitutional and statutory presumption points toward sustaining this important, local public health measure. In the absence of a crystal clear direct conflict with state law the ordinance should be upheld.

III. THERE IS NO CONFLICT BETWEEN THE STATUTE AND THE ORDINANCE.

The statutory history of increasing protection for nonsmokers in restaurants over the last two decades shows the direction the Legislature has taken toward a more smoke-free restaurant environment. Appellees' position ignores or misinterprets the intent of the Legislature.

The original language of Section 12905 of the Public Health Code, MCL 333.12905; MSA 14.15 (12905), on which appellees' rely, was adopted in 1978 as P.A. 1978 No. 368. It provided that larger food service establishments (with a seating capacity of 50 or more) must seat patrons in a nonsmoking area upon request. The statute created a right to a nonsmoking table without restricting or limiting smoking areas.

In 1986 Section 12905 was amended by P.A. 1986, No. 96 to require a minimum number of tables for nonsmokers depending on the seating capacity of the restaurant (50-100 persons - at least 3 tables; 100-150 persons - at least 6 tables; more than 150 persons - at least 9 tables). This amendment enhanced the protection of nonsmokers by providing a minimum number of nonsmoking tables, but, as before, it did not directly restrict smoking or smoking areas.

Neither of these earlier provisions, although providing limited protection for nonsmokers, would have preempted the Marquette ordinance at issue here even under appellees' direct conflict test of whether the ordinance prohibits an act which the statute permits or permits an act which the statute prohibits. The earlier versions of Section 12905 would not have preempted the Marquette ordinance because they did not even arguably guarantee a restaurant the right to permit smoking. The Marquette ordinance thus would only have provided a stricter regulation and would not have been in conflict with those statutes.

The 1993 amendment to Section 12905, P.A. 1993 No. 242, shifted the focus of the statute by moving from limited rights for nonsmokers in food service establishments toward a general concept of smoke-free restaurants. This is apparent from the first sentence of the new provision:

> Except as otherwise provided in this section, all public areas of a food service establishment shall be nonsmoking.

MCL 333.12905(1); MSA 14.15 (12905). The statute is a step toward establishing nonsmoking as the usual condition in restaurants, whereas prior to the 1993 amendment nonsmoking was incidental, initially available only upon request and later for a limited number of tables.

In this progression toward smoke-free dining, it is hardly conceivable that the Legislature intended to guarantee that at least 50% of restaurant seating (at least 75% in smaller restaurants and

private clubs) could be devoted to smoking. The purpose and effect of the 1993 amendment was to increase nonsmoking areas and reduce restaurant smoking. Nothing in the historical development of the statute or in the public health considerations responsible for the legislation gives the slightest indication of a purpose to guarantee smoking areas. This is also clear from the Legislative Analysis of HB 4457 which became the 1993 amendment:

> Requiring that at least half the seating in larger restaurants be designated as nonsmoking would greatly reduce patrons' exposure to environmental tobacco smoke and its related health risks . . . The bill should be an additional step toward making all Michigan eating establishments smoke free. The bill clearly intends to create a more healthful environment in food service establishments. (Emphasis added)

Appellees are trying to convert a measure designed as an additional step toward smoke-free restaurants into a statutory assurance of a right to have at least half the seating available for smoking. It is clear this is not what the Legislature intended.

Appellees rely on the "may designate" language of Section 12905(2): a smaller restaurant "may designate" up to 75% of its seating capacity as seating for smokers. Larger restaurants "may designate" up to 50% of seating capacity for smokers. While appellees' reading of this language might be plausible in a vacuum, it must give way to an interpretation consistent with the development and purpose of the statute.

It is significant that the Legislature chose the phrase "may designate" instead of other phrases that would have clearly established a right to permit smoking. Section 12905 might have said that a restaurant "shall be entitled to" provide smoking in up to 50% of its seating or "shall have the right to" have a smoking area of that size. The use of "may designate" instead of phrases that would have

been unambiguous indicates that there are other interpretations than the one advanced by appellees. Indeed, a primary dictionary definition of "designate" is "to point out the location of" and to "indicate," "identify," "label." Websters Third New International Dictionary. Although other definitions may be more consistent with appellees' position, these primary definitions indicate that "may designate" means only that a legally permissible smoking section must be identified or designated as such. In other words, the provision goes to the point of identifying smoking areas to the public so as to minimize confusion and conflict among patrons. It does not guarantee the right to smoke in a restaurant. This interpretation is also consistent with the language of Section 12905(2) that "[A] food service establishment that designates seating for smokers shall clearly identify the seats for nonsmokers as nonsmoking . . . ." The smoking "designation" is a matter of identification and was not intended to create a guaranteed right to have a smoking area, which would be inconsistent with the historic progression of the Legislature's treatment of smoking in food service establishments.

The dual principles of liberal construction in favor of the validity of municipal ordinances and liberal construction of the public health code for the protection of the people compel the conclusion that the Marquette ordinance does not conflict with the statute.

CONCLUSION

The statute should be liberally construed in favor of the City of Marquette and its public health Ordinance. The finding of preemption should be rejected. The Circuit Court's order should be reversed.

Respectfully submitted,

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Dated: July 21, 1999

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