April 24, 2001

OPINION NO. 2001-017

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624-1680

Dear Prosecutor Bates:

We have received your request for an opinion concerning the authority of a general health district to regulate or ban smoking in public areas. You have asked the following questions:

1. Does Section 3709.21 of the *Ohio Revised Code* grant a general health district the authority to enact a "Clean Indoor Air Regulation" which would ban smoking in all Public Places located within the district?

2. If R.C. 3709.21 does grant a general health district the authority to regulate or ban smoking, does any other section of the *Ohio Revised Code* preempt the exercise of such authority?

3. If R.C. 3709.21 grants a general health district the authority to regulate or ban smoking, and no other section of the *Ohio Revised Code* preempts the exercise of such authority, can such a regulation contain exceptions or the opportunity for variances based upon factors other than protection of the public health?

Your request pertains to the Lucas County Regional Health District, which is a general health district including all areas within Lucas County. *See* R.C. 3709.01. You have informed us that the Lucas County Regional Health District is currently considering the enactment of a "Clean Indoor Air Regulation." The proposed regulation would ban smoking in all public areas within the county, including public areas of all places of employment. It would define public areas to include all enclosed areas to which members of the general public are invited or in which members of the general public normally are permitted.

Let us consider initially your first question, which asks whether R.C. 3709.21 grants a general health district authority to enact a regulation that bans smoking in all public places

located within the district. R.C. 3709.21 states, in pertinent part: "The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." R.C. 3709.21. The statute goes on to specify that the board of health may require permits for the discharge of certain wastes into storm sewers, open ditches, or watercourses. The statute also specifies the manner in which orders and regulations intended for the general public must be adopted. *Id*.

The question you have raised is whether the general authority of a board of health to "make such … regulations as are necessary … for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances" authorizes the board of health to regulate or ban smoking in public places within the district. R.C. 3709.21. For purposes of this opinion, we consider the proposal that smoking be banned in certain areas within the health district to be a type of regulation of smoking. Whether particular regulations would be valid depends upon the terms of those regulations and their applicability in particular circumstances and cannot be determined by means of a formal opinion of the Attorney General. While this opinion does not attempt to consider all challenges that might be brought against the validity of particular regulations, we are able to provide you with a general discussion of some pertinent legal principles.

As your letter notes, the question of adoption of nonsmoking regulations by a board of health has been addressed in two Ohio cases. In *Cookie's Diner, Inc. v. Columbus Board of Health*, 65 Ohio Misc. 2d 65, 640 N.E.2d 1231 (Franklin County Mun. Ct., Env. Div. 1994), the Environmental Division of the Franklin County Municipal Court considered two sets of essentially identical nonsmoking regulations, one adopted by the Franklin County District Board of Health (board of a general health district) and the other by the Columbus Board of Health (board of a city health district). The court concluded, as a matter of law, that the power to regulate smoking is contained within the statutory powers granted to the boards of health by R.C. 3709.21, which applies to general health districts, and by R.C. 3709.20(A), which contains identical language that applies to city health districts. *Cookie's Diner, Inc. v. Columbus Bd. of Health*, 65 Ohio Misc. 2d at 75, 640 N.E.2d at 1237. The court went on to conclude that the regulations did not conflict with state law and were not preempted by existing statutory provisions. However, the court concluded also that the regulations exceeded the boards' power to make rules and, instead, constituted lawmaking that usurped legislative power. Therefore, the rules were declared invalid. *Id.* at 78, 84-86, 640 N.E.2d at 1239, 1243-44.

In *Brewery, Inc. v. Delaware City-County Board of Health*, No. 98CVH-12-413 (C.P. Delaware County July 22, 1999), the Delaware County Court of Common Pleas considered a nonsmoking regulation adopted by the Delaware City-County Board of Health. The court concluded, as a matter of law, that the General Assembly did not delegate to the board of health the authority to regulate smoking in public places and found that the board of health lacked authority to promulgate or enforce the challenged regulation.

The *Cookie's Diner* decision construes the statutory grant of power to boards of health broadly, concluding that boards of health may regulate matters of health even if those matters are not expressly mentioned in their statutory powers. On this point, the *Cookie's Diner* case states:

> The court finds that R.C. 3709.20 and 3709.21 grant the boards [of health] wide discretion to promulgate regulations relative to the public health, and, in regulating, do not limit the boards to only those matters specifically identified by the General Assembly. If the General Assembly had intended to restrict the boards' permitted area of regulations to specifically named matters, and only those matters, the General Assembly could have done so. It chose not to. It chose not to, because in the words of *Weber* [*v. Bd. of Health*, 148 Ohio St. 389, 396, 74 N.E.2d 331, 336 (1947)], "the nature of the problem" (the problem being the protection of the public health) is such that it is impossible to lay down precise standards to define what unheard-of or newly discovered public health hazards or diseases might be on the next horizon.
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> The logic of plaintiffs' argument would be that if in the boards' vigilance, and after thorough and open public hearings, the boards identify a specific health hazard or a new disease (what is our next AIDS epidemic?), unless or until the General Assembly enacts a statute directing the boards to act on that specific new health hazard or disease, the boards could not.

Cookie's Diner, Inc. v. Columbus Bd. of Health, 65 Ohio Misc. 2d at 73-74, 640 N.E.2d at 1236. The court goes on to conclude: "So long as the boards [of health] promulgate regulations designed to promote the general policy of the General Assembly to protect the public health, and so long as the regulations are reasonable, nondiscriminatory, and not contrary to constitutional rights and to legislation, the regulations would be valid." *Id*. at 74, 640 N.E.2d at 1236.

In contrast, the *Brewery* case construes the statutory grant of power to boards of health narrowly, finding that it authorizes boards of health "to adopt <u>regulations</u> for the stated purposes where other statutory language delegates more specific authority with appropriate standards for its application and implementation," but does not give the boards "unlimited authority to control any activity which affects 'public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances'." *Brewery, Inc. v. Delaware City-County Bd. of Health*, slip op. at 7, 8.

R.C. 3709.20 and 3709.21 have been upheld by the Ohio Supreme Court as constitutional delegations of authority to boards of health. *Weber v. Board of Health*, 148 Ohio St. 389, 389, 74 N.E.2d 331, 332 (1947) (syllabus, paragraph 1);[1] *accord DeMoise v. Dowell*, 10 Ohio St. 3d

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[1] Although *Weber v. Board of Health* upheld the constitutionality of the statute granting regulatory authority to general health districts, it found that a resolution of a general health district making it unlawful to transport collected garbage for the purpose of feeding swine, but

92, 461 N.E.2d 1286 (1984); *see also* R.C. 3709.22 ("[t]he board [of health] may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease"). The Ohio Supreme Court has recognized that, in the area of public health, it is sometimes impossible for the General Assembly to provide an administrative agency with specific standards, and that a board of health may be granted wide latitude in making and enforcing regulations to protect the public health. *Weber v. Board of Health*, 148 Ohio St. at 389, 74 N.E.2d at 332 (syllabus, paragraphs 2 and 3); s*ee Stubbs v. Mitchell*, 65 Ohio L. Abs. 204, 208, 114 N.E.2d 158, 160-61 (Ct. App. Franklin County 1952) ("[s]ince the authority [of boards of health] for the exercise of broad powers comes under the police power inherent in the State, the power is practically coextensive with the necessities that may arise for the purpose indicated. However, it does not authorize the Board of Health to arbitrarily establish a rule without reason, but it leaves in the Board a very broad latitude in determining what is reasonable" (citations omitted)); 1999 Op. Att'y Gen. No. 99-009, at 2-68 ("[a] general health district has broad authority to adopt rules that protect the public health"); 1925 Op. Att'y Gen. No. 2308, p. 155, at 156 ("the laws are more liberally construed in reference to the authority undertaking to exercise the police power in respect to the public health than any other field which has come under my observation").

Nonetheless, a board of health does not have unlimited authority to take whatever action it pleases. A board of health may take only such action as is authorized by statute. It is not permitted to transcend its administrative rulemaking power and exercise legislative functions in violation of Ohio Const. art. II, § 1. *Weber v. Board of Health*, 148 Ohio St. at 389, 74 N.E.2d at 332 (syllabus, paragraph 2).

The *Cookie's Diner* case and the *Brewery* case reach different conclusions with respect to the extent of the powers granted by R.C. 3709.21, and the Ohio Supreme Court has not spoken directly to the question whether a general health district has authority to regulate or ban smoking

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authorizing the health commissioner, without any standards for guidance, to approve a system of garbage collection and disposal, constituted an attempted delegation of legislative power and violated the equal protection guarantees of the state and federal constitutions. *Weber v. Board of Health*, 148 Ohio St. 389, 389-90, 74 N.E.2d 331, 332-33 (1947) (syllabus, paragraph 4). The Ohio Supreme Court stated, in part: "The making of … reasonable rules and regulations would constitute an administrative function, but when defendants undertake to prohibit a business not of itself unlawful and which is susceptible to proper regulation they go beyond their administrative powers and exercise a legislative function which, under our Constitution, belongs exclusively to the General Assembly." *Id*. at 400, 74 N.E.2d at 337. Thus, the decision in the *Weber* case was based in part on the fact that the board of health prohibited certain activity when the public health could have been protected by regulation that was nondiscriminatory and less intrusive. *See also State ex rel. Crabtree v. Franklin County Bd. of Health*, 77 Ohio St. 3d 247, 673 N.E.2d 1281 (1997) (noting that county prosecutor advised board of health that the board could regulate tattooing but could not prohibit it).

within the district.[2] Consistent with the *Cookie's Diner* case, our research discloses instances in which R.C. 3709.21 and R.C. 3709.20(A) have been construed broadly, to include power to regulate health-related matters that are not directly addressed by statute. *See, e.g.*, *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 567 N.E.2d 1018 (1991); *Schlenker v. Board of Health*, 171 Ohio St. 23, 167 N.E.2d 920 (1960) (broad powers granted by R.C. 3709.21 and R.C. 3709.22 authorized general health district to require pasteurization of milk when no statute addressed that matter); 1993 Op. Att'y Gen. No. 93-005, at 2-31 (local board of health has authority pursuant to R.C. 3709.21 and other general provisions to regulate the establishment and operation of cemeteries); 1992 Op. Att'y Gen. No. 92-045; 1992 Op. Att'y Gen. No. 92-043; 1957 Op. Att'y Gen. No. 1017; *see also Trumbull County Bd. of Health v. Snyder*, 74 Ohio St. 3d 357, 658 N.E.2d 783 (1996) (before enactment of statute expressly addressing disposal of construction and demolition debris, boards of health regulated that matter pursuant to their general powers under R.C. 3709.20 and R.C. 3709.21).

Our research also discloses instances in which particular health-related matters have been found to exceed the powers of the board of health. However, those findings are generally based upon provisions indicating that a particular matter has not been delegated to the board of health. *See, e.g.*, *Weber v. Board of Health*, 148 Ohio St. at 389, 74 N.E.2d at 332 (syllabus, paragraph 3) ("the board of health of a general health district has a wide latitude in making and enforcing rules and regulations for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisance, but when such board passes a resolution which prohibits a business not unlawful in itself and which is susceptible to regulations which will prevent it from becoming either a health menace or a nuisance, such board transcends its

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[2] That this is an issue of longstanding and continuing controversy is evidenced by the fact that the construction of the predecessor to R.C. 3709.21 was considered in 1941 by a prior Attorney General, as follows:

> If the statute in question is to be considered as an independent delegation of authority unrestricted by other sections of the act, then it must be concluded that the board is empowered to make rules and regulations unlimited so long as they pertain to the public health and the prevention of disease and do not contravene constitutional guarantees. If, however, the rule making power of the board is construed as being incident to and limited by the powers expressly granted and only as a medium through which the board may effectuate the duties imposed upon it by law, it becomes necessary to examine the statutes in detail ….

1941 Op. Att'y Gen. No. 4380, p. 886, at 887-88. That opinion reviewed cases and opinions that supported both positions. "[I]n view of the fact that health laws are liberally construed and that the protection of the public health is one of the first duties of government," the opinion followed earlier Attorney General opinions that construed the statute as an independent delegation of authority. *Id.* at 889. The opinion went on to find authority for a general health district to provide for the inspection of trailer camps and impose reasonable standards.

administrative rule-making power and exercises legislative functions in violation of Section 1 of Article II of the Constitution of Ohio"); *Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957) (finding that general authority granted by R.C. 3709.21 does not authorize the board of health to license plumbers, where statutory provisions expressly authorize municipalities to license plumbers; court suggests but does not decide that R.C. 3709.21 by implication authorizes board of health to enact reasonable regulations requiring the registration of plumbers); *Jackson v. City of Franklin*, 72 Ohio App. 3d 431, 594 N.E.2d 1018 (Montgomery County 1991) (prior to enactment of statute expressly authorizing boards of health to regulate swimming pool operations, boards of health had no such power pursuant to the general language of R.C. 3709.21, in part because it is a matter of public safety, rather than public health); 1994 Op. Att'y Gen. No. 94-044 (board of health is not authorized by R.C. 3709.20 or R.C. 3709.21 to require Department of Natural Resources to obtain a license or pay a fee for operating public bathing beaches in state parks; other statutes expressly empower boards of health to license certain public bathing facilities, including state's public swimming pools).

As evidenced by the *Brewery* case, the conclusion that a general health district has authority to adopt regulations that restrict or ban smoking in public places is subject to debate. Nonetheless, our review of the issue persuades us that the stronger argument supports the interpretation of R.C. 3709.21 set forth by the court in the *Cookie's Diner* case. Accordingly, based upon that case and the other authorities discussed above, it is our conclusion that a general health district's authority to adopt regulations to protect the public health is not limited to matters that are expressly mentioned by statute. Therefore, we conclude that, pursuant to R.C. 3709.21, a general health district has authority to adopt regulations that regulate or ban smoking in public places within the district, provided that the regulations are necessary to promote the public health, prevent or restrict disease, or prevent, abate, or suppress nuisances, and provided that the regulations are reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution.

Finally, a determination of the validity of particular regulations will depend upon the content of the particular regulations and the nature of evidence presented in a particular case. You have indicated that the proposed regulations would ban smoking in all public areas within the health district. Such regulations are permissible only if it can be established on the basis of sound scientific evidence that they meet the statutory standards of being necessary to promote the public health or prevent disease or nuisance and also that they are reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution. Compliance with these standards could be questioned if there is a method other than an outright ban that allows smoking in a public place and still protects the public health. Therefore, we are unable to predict what findings a court might make with respect to the authority of the Lucas County Regional Health District to regulate smoking as a health issue.

Let us turn next to your second question, which asks whether any provision of the Revised Code preempts the regulation or ban of smoking by a general health district. As your letter indicates, the statute of concern in this regard is R.C. 3791.031, which requires that places of public assembly have designated "no smoking" areas, prohibits anyone from smoking in a

designated "no smoking" area, and makes a violation of its provisions a minor misdemeanor. R.C. 3791.031(A), (D), and (E). For purposes of this statute, places of public assembly include auditoriums, classrooms, elevators, and government buildings, but do not include restaurants or other food service establishments, bowling alleys, or places licensed to sell intoxicating beverages on the premises. R.C. 3791.031(A). The authority to designate "no smoking" areas in the defined places of public assembly is delegated to local fire authorities, the Director of Administrative Services, officers designated by the legislative authorities of political subdivisions, various state officials, and certain proprietors. R.C. 3709.031(B). The statute specifies that "[a] no smoking area may include the entire place of public assembly." *Id*.

In providing for the designation of nonsmoking areas, R.C. 3791.031 excludes from its coverage a variety of facilities accessed by the public. It does not address the question whether there may or must be areas in which smoking is permitted. It contains no reference to local boards of health. It contains no language indicating an intention on the part of the General Assembly to preempt other regulation of smoking by local authorities. Thus, R.C. 3791.031 appears to permit the regulation of nonsmoking areas by various local authorities, within their statutory powers and their areas of jurisdiction and in a manner not in conflict with other provisions of law. *See generally City of Middleburg Heights v. Ohio Bd. of Bldg. Standards*, 65 Ohio St. 3d 510, 605 N.E.2d 66 (1992); *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*; *DeMoise v. Dowell*; 1992 Op. Att'y Gen. No. 92-045.

Both the *Cookie's Diner* case and the *Brewery* case take the position that the existence of R.C. 3791.031 does not preclude a local authority from taking such action as its enabling statutes permit to regulate smoking within its jurisdiction. *See Brewery, Inc. v. Delaware City-County Bd. of Health*, slip op. at 3 n.1 ("inasmuch as nothing in R.C. 3791.031 expressly asserts preemption, and no provision dictates different restrictions than this Board [of Health] adopted, the statute apparently permits comparable local regulation if an appropriate local legislative body adopts it"); *Cookie's Diner, Inc. v. Columbus Bd. of Health*, 65 Ohio Misc. 2d at 78, 640 N.E.2d at 1239 ("this court concludes that defendant [health] boards' regulations are not in conflict with state law, nor are they preempted by the smoking regulations enacted in R.C. 3791.031"). We concur in this conclusion. Further, we are aware of no other statute that would preclude such action on the part of a general health district or other local authority. We conclude, therefore, that R.C. 3791.031, which requires nonsmoking areas in places of public assembly, does not preempt a general health district from exercising such statutory authority as it may have under R.C. 3709.21 to regulate or ban smoking within its jurisdiction.

Let us now address your third question, which asks, if R.C. 3709.21 grants a general health district the authority to regulate or ban smoking, whether a regulation adopted by a general health district pursuant to that authority may contain exceptions or opportunities for variances based upon factors other than protection of the public health. Pursuant to R.C. Chapter 3709, a general health district is a creature of statute which has only those powers that it is given by statute, either expressly or by implication. *See, e.g., Wetterer v. Hamilton County Bd. of Health*; 1994 Op. Att'y Gen. No. 94-030, at 2-136 to 2-137; 1984 Op. Att'y Gen. No. 84-090, at 2-308. Accordingly, with respect to the authority to regulate or ban smoking, the board of health

of a general health district has only such authority as comes within the language of R.C. 3709.21 stating that the board "may make such orders and regulations as are necessary … for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." R.C. 3709.21. These purposes thus limit the nature of the regulations that the board may adopt. *See, e.g.*, 1953 Op. Att'y Gen. No. 2679, p. 207, at 208 ("any regulation adopted by a board of health must have for its sole purpose the protection of the public health, and its validity will be tested in the first instance by the question whether it is intended to and does accomplish this purpose").

In adopting regulations, a board of health is permitted to make reasonable classifications and to make distinctions in the way those classes are treated, provided that the regulations are reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution. *See, e.g., Weber v. Board of Health*, 148 Ohio St. at 396, 74 N.E.2d at 336; *Shockey v. Winfield*, 97 Ohio App. 3d 409, 413, 646 N.E.2d 911, 914 (Ross County 1994) (appropriate test for determining constitutionality of smoking regulations is whether differential treatment is rationally related to some legitimate state interest); 1994 Op. Att'y Gen. No. 94-090, at 2-450; 1953 Op. Att'y Gen. No. 2679, p. 207, at 210 ("[i]t is a rule applicable to all legislation, whether state or local, that a statute or other measure must have uniform operation, and must not discriminate in favor of or against classes of people"). Any such classifications, however, must be established within the authority granted to the board of health – that is, the authority to regulate for the purpose of protecting the public health, preventing or restricting disease, and preventing, abating, or suppressing nuisances. *See, e.g., Cookie's Diner, Inc. v. Columbus Bd. of Health*, 65 Ohio Misc. 2d at 81, 640 N.E.2d at 1241 ("boards [of health] must stay within their R.C. 3709.20 and 3709.21 grants of power in the regulating of smoking for the protection of public health…. The court … finds that there is no reasonable and nondiscriminatory rationale (*Weber*) that permits the boards to make variances and exceptions for the protection of the public health relative to smoking in enclosed areas open to the public, since the effect of the variances and exemptions discriminates among operators in their abilities to offer their businesses to the public on an equal footing"); *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 588, 478 S.E.2d 528, 534 (1996) ("[f]or this purpose [minimizing the public's exposure to environmental tobacco smoke] to be achieved in a manner which does not infringe upon the General Assembly's legislative power to make policy-based distinctions, the [administrative body] must, for example, treat similarly situated patrons and employees of all restaurants equally…. To act otherwise would expose some employees and patrons to a health risk that other similarly situated employees and patrons do not face. Without dispute, such distinctions involve the balancing of factors other than health"); *cf. Brewery, Inc. v. Delaware City-County Bd. of Health*, slip op. at 3 ("there is no apparent reason why an administrative agency would be unable to consider economic hardship in excusing rigid compliance if an appropriate legislative body granted it authority to consider that factor").

Members of a board of health are expected to exercise a reasonable discretion in creating a regulatory system. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"). It is

anticipated that, as responsible public servants, they will be aware of economic, practical, and social factors that may affect the application, enforcement, and wisdom of the rules they adopt. Nonetheless, their authority to adopt rules is limited to the purposes designated by statute.

Pursuant to R.C. 3709.21, boards of health do not have authority to regulate for purposes other than the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. Therefore, they cannot adopt rules containing provisions that have any purpose other than the protection of the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances. *See Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d at 36-37, 567 N.E.2d at 1026 ("regulations adopted by the local health districts must be limited to these considerations of protecting the public health, preventing disease, and abating nuisance"); 1992 Op. Att'y Gen. No. 92-045, at 2-180 ("[a]ny such regulation must, in accordance with R.C. 3709.21, be for the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances"); 1953 Op. Att'y Gen. No. 2679, p. 207.

Whether particular rules come within the statutory powers granted to boards of health, or whether they exceed those powers, depends upon the particular rules and must be determined by a court in light of all relevant circumstances.[3] Whether particular rules may come within the statutory powers even though they may also bear some relationship to economic or practical

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[3] Such issues were considered by the Court of Appeals of New York when it struck down a nonsmoking regulation adopted by the Public Health Council [PHC] on the basis that the Council exceeded its statutory authority. The court stated, in part:

> [W]hile generally acting to further the laudable goal of protecting nonsmokers from the harmful effects of "passive smoking," the PHC has, in reality, constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns. The exemptions the PHC has carved out for bars, convention centers, small restaurants, and the like, as well as the provision it has made for "waivers" based on financial hardship, have no foundation in considerations of public health. Rather, they demonstrate the agency's own effort to weigh the goal of promoting health against its social cost and to reach a suitable compromise….
>
> Striking the proper balance among health concerns, cost and privacy interests, however, is a uniquely legislative function…. This conclusion is particularly compelling here, where the focus is on administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values.

Boreali v. Axelrod, 71 N.Y.2d 1, 11-12, 517 N.E.2d 1350, 1355, 523 N.Y.S.2d 464, 469-70 (Ct. App. 1987).

matters cannot be determined by a formal opinion of the Attorney General. The standard for rulemaking by boards of health is that rules may be enacted for the purposes prescribed by statute, and the rules must be reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution. *See, e.g., Weber v. Board of Health*. This standard applies to any exceptions or opportunities for variance that may be included as part of the rules.

In the *Cookie's Diner* case, the court considered the validity of particular rules. The court examined those rules and stated: "Throughout the regulations run currents of concern that seem to be other than solely public health concerns." *Cookie's Diner, Inc. v. Columbus Bd. of Health*, 65 Ohio Misc. at 80, 640 N.E.2d at 1240. We are not examining particular rules and thus cannot comment on whether the analysis set forth in the *Cookie's Diner* case is applicable to your concerns. That decision, however, addresses a number of matters pertaining to the purpose and discriminatory nature of rules that may be relevant to your situation. *See also Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (Ct. App. 1987); *City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 478 S.E.2d 528 (1996). *See generally Fagan v. Axelrod*, 146 Misc. 2d 286, 297-99, 550 N.Y.S.2d 552, 559-60 (Sup. Ct. Albany County 1990) (upholding nonsmoking regulatory scheme adopted by legislature and stating: "The use of considerations of spatial dimensions and proximity of smokers to non-smokers in certain instances, and complete prohibition of smoking in others, represents an accommodation between the desire to limit the exposure of non-smokers to tobacco smoke and relevant economic and social considerations…. Striking a proper balance among health concerns, cost and privacy interests is a uniquely legislative [as opposed to administrative] function").

In response to your specific question, if a general health district acts pursuant to R.C. 3709.21 to regulate or ban smoking, the general health district cannot adopt a regulation that contains exceptions or opportunities for variances based upon factors other than the protection of the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances.

Therefore, it is my opinion and you are hereby advised as follows:

1. Pursuant to R.C. 3709.21, a general health district has authority to adopt regulations that regulate or ban smoking in public places within the district, provided that the regulations are necessary to promote the public health, prevent or restrict disease, or prevent, abate, or suppress nuisances, and provided that the regulations are reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution.

2. R.C. 3791.031, which requires nonsmoking areas in places of public assembly, does not preempt a general health district from exercising such statutory authority as it may have under R.C. 3709.21 to regulate or ban smoking within its jurisdiction.

3. If a general health district acts pursuant to R.C. 3709.21 to regulate or ban smoking, the general health district cannot adopt a regulation that

contains exceptions or opportunities for variances based upon factors other than the protection of the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

April 24, 2001

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624-1680

SYLLABUS: 2001-017

1. Pursuant to R.C. 3709.21, a general health district has authority to adopt regulations that regulate or ban smoking in public places within the district, provided that the regulations are necessary to promote the public health, prevent or restrict disease, or prevent, abate, or suppress nuisances, and provided that the regulations are reasonable, nondiscriminatory, and not in conflict with provisions of statute or constitution.

2. R.C. 3791.031, which requires nonsmoking areas in places of public assembly, does not preempt a general health district from exercising such statutory authority as it may have under R.C. 3709.21 to regulate or ban smoking within its jurisdiction.

3. If a general health district acts pursuant to R.C. 3709.21 to regulate or ban smoking, the general health district cannot adopt a regulation that contains exceptions or opportunities for variances based upon factors other than the protection of the public health, the prevention or restriction of disease, or the prevention, abatement, or suppression of nuisances.