

OPINION NO. 90-019**Syllabus:**

Smoking in an area designated as a no smoking area in a county building available to the public prior to such designation is enforceable as a minor misdemeanor pursuant to 3791.031(D) and (E) if such designation was made by the appropriate county officer and by the placement of clearly visible "no smoking" signs.

To: Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 3, 1990

I have before me your request for my opinion on the following question:

May the prohibition against smoking in an area of a county building designated as a no smoking area pursuant to R.C. 3791.031 be enforced as a minor misdemeanor pursuant to R.C. 3791.031(D) and (E) where the building had been available to the public prior to the designation of the no smoking area?¹

R.C. 3791.031, which was enacted by Am. Sub. S.B. 96 (1976 Ohio Laws, 4-350), mandates that

"[f]or the purpose of separating persons who smoke from persons who do not smoke for the comfort and health of persons not smoking, in every place of public assembly there shall be an area where smoking is not permitted, which shall be designated a no smoking area....The designation shall be made before the place of public assembly is made available to the public."

R.C. 3791.031(B). A "place of public assembly" is defined by R.C. 3791.031(A) to include, *inter alia*, "[a]ll buildings and other enclosed structures owned by the state, its agencies, or political subdivisions...." R.C. 3791.031(A)(2). Since the

¹ With your concurrence, I have reworded the question for ease of analysis.

county is a political subdivision of the state,² county-owned buildings are "places of public assembly" for purposes of this statute.

Although R.C. 3791.031 requires that the designation of no smoking areas be made before the place of public assembly is made available to the public, Section 2 of Am. Sub. S.B. 96 provides that, with respect to places of public assembly that are available to the public on the effective date of the act,³ those persons required by R.C. 3791.031(B) to designate no smoking areas shall do so no later than January 1, 1977. Section 2 further provides that such persons shall not be guilty of a violation of R.C. 3791.031 for any failure to comply prior to January 1, 1977. Thus, every place of public assembly available to the public on or after January 1, 1977 is required to have a designated no smoking area.

Your question asks whether smoking in an area designated as a no smoking area pursuant to R.C. 3791.031(B) can be enforced as a criminal offense, to wit, a minor misdemeanor, where the no smoking area is located in a county building which was available to the public prior to the designation of the no smoking area. Only conduct which is defined as an offense in the Revised Code constitutes a criminal offense. R.C. 2901.03(A). "[A criminal] offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty." R.C. 2901.03(B). Therefore, the question is whether R.C. 3791.031 states a positive prohibition against smoking in a no smoking area located in a building which was available to the public prior to the designation of the no smoking area.

R.C. 3791.031(D) declares that "[n]o person shall smoke in any area designated as a no smoking area in accordance with division (B) of this section." With respect to buildings owned by counties, division (B) mandates that the legislative authority⁴ of the county "shall designate an officer who shall designate the [no smoking] area." R.C. 3791.031(B). Division (B) further requires that "[d]esignations shall be made by the placement of signs that are clearly visible and that state 'no smoking.'" *Id.* Thus, the designation must be made by the appropriate officer and by the placement of clearly visible "no smoking" signs. Division (B) of R.C. 3791.031 also states that "[t]he designation shall be made before the place of public assembly is made available to the public." This is, of course, impossible in the case of buildings which were available to the public prior to the effective date of the act. However, the legislature, in Section 2 of Am. Sub. S.B. 96, provided an exception to this requirement by directing that no smoking area designations be made no later than January 1, 1977 for buildings already available to the public on August 31, 1976, the effective date of the act. Moreover, it is a general rule of statutory construction that a statute should be construed to avoid unreasonable or absurd consequences. *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 481 N.E.2d 632 (1985). I find, therefore, that the legislature did not intend to require a logical impossibility and that the requirement that the designation of no smoking areas be made before the place of public assembly is made available to the public does not apply to places of public assembly already available to the public on August 31, 1976. A no smoking area in a place of public assembly which was already available to the public on August 31, 1976, therefore, is designated in accordance with division (B) of R.C. 3791.031 if it is so designated by the appropriate officer and by the placement of clearly visible "no smoking" signs. Thus, smoking in such an area is a violation of R.C. 3791.031(D) and may be punished as a minor misdemeanor pursuant to R.C. 3791.031(E).

² Although not defined for purposes of Chapter 3791, "political subdivision" has been defined to include "county" in several other contexts. *See, e.g.*, R.C. 2744.01(F), R.C. 3501.01(T); and R.C. 5713.081.

³ The effective date of Am. Sub. S.B. 96 was August 31, 1976.

⁴ The "legislative authority" of a county is the board of county commissioners. *See* R.C. 302.13(M).

Accordingly, it is my opinion and you are hereby advised, that smoking in an area designated as a no smoking area in a county building available to the public prior to such designation is enforceable as a minor misdemeanor pursuant to 3791.031(D) and (E) if such designation was made by the appropriate county officer and by the placement of clearly visible "no smoking" signs.