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Ms. Smith,

Thank you for your request for our comments on the litigation risk presented by the new exemption to the 2018 smoke free ordinance in Augusta, Georgia. **As you know, the Public Health Law Center does not provide legal representation or advice, and it is not authorized to practice law in Georgia.** If you require a legal opinion, we encourage you to consult local counsel. In addition, we do not lobby. The information we provide is for educational purposes only; we do not ask that policy makers take a specific action based on our comments. That said, we are pleased to offer our comments and observations based on our experiences with many tobacco control laws and policies in other jurisdictions.

Exemptions in public health laws, such as smoke free ordinances, can draw litigation challenges for treating one group of people or businesses differently than others. These legal challenges generally raise Constitutional issues, such as equal protection and due process claims. A court's consideration of these claims will often factor in the legislative purpose or determine whether the disparate treatment of different businesses was reasonably related to inherent differences in the business classification (i.e., what is different about the business being exempted). Although time constraints prevent thorough research of all possible claims against the 2021 amendment of the Augusta smoke free ordinance before consideration on Tuesday, it is clear that adding this exemption creates some litigation risk. Where, as here, the exemption is wholly unrelated to – and perhaps even contradictory to – the public health rationale laid out in the 2018 Ordinance No. 7622, may make it difficult to defend. In addition, any litigation challenge may raise the question of whether the different treatment of the exempted business reasonably relates to the inherent differences in that kind of business.

Lawsuits over exemptions in smoke free laws vary in outcome based on the specific facts of the case, the language in the challenged ordinance, and the constitutional provisions at issue. Litigation challenges over exemptions in tobacco control ordinances are rather common, so an exhaustive list is not possible here. But to give a flavor for the litigation landscape related to smoke free exemptions, it is worth considering some examples. Several Indiana cities faced multiple lawsuits over exemptions in their respective smoke free ordinances. *See, Paul Stielor Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269, 1272 (Ind. 2014); *Whistle Stop Inn, Inc. v. City of Indianapolis*, 36 N.E.3d 1118, 1120 (Ind. Ct. App. 2015), opinion aff'd in part, vacated in part, 51 N.E.3d 195 (Ind. 2016); and *Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). Similarly, a town in Missouri was sued over its smoke free ordinance's exemption of riverboat casinos. *City of St. Joseph v. Leer*, 474 S.W.3d 196, 197 (Mo. Ct. App. 2015).

Legal challenges to smoke free laws can be expensive and time-consuming to address, regardless of outcome. Even if the exemption is on solid legal footing, that doesn't prevent litigation from being filed and significant litigation costs from accruing. For example, according to the University of Kentucky College of Nursing, the city of Lexington has spent more than \$330,000 in legal fees since the 2003 passage of its smoke free law. See, <https://www.uky.edu/breathe/tobacco-policy/quick-facts-topic/smoke-free-policy-exemptions/exemptions-and-smoke-free-laws>. The ordinance has faced multiple suits, largely focused on the exemption of private organizations from the law. The same resource notes that Louisville has had to defend its 2005 smoke free ordinance over exemptions as well.

I hope this information is helpful to you as you evaluate the litigation risk and legal defensibility of the 2021 Amendment to Augusta's smoke free ordinance. As always, please do not hesitate to contact us if we can be of any further assistance on this or any other tobacco-law related issue.

Kind regards,

Joelle