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OUTSIDE VIEW: LIBERTY VS. PUBLIC HEALTH

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WASHINGTON, Dec. 3 (UPI) – Since Sept. 11, the U.S. government has attempted to impose a variety of measures that dance the fine line between legitimate measures designed to protect the health and safety of American citizens and unlawful ones that infringe upon basic U.S. civil rights and liberties.

Fortunately, citizen outrage recently prevented one local county government from crossing that line in the most egregious of ways.

On Nov. 20, the Montgomery County Council, in one of the most affluent Maryland suburbs of Washington, D.C. – and of the entire nation – voted to impose fines of up to \$750 for smoking tobacco within the confines of the privacy of your own home if it offended your neighbors.

The County Council rationalized this unprecedented decision by holding that tobacco smoke was exactly the same as other potentially harmful pollutants – just like asbestos, radon, molds or pesticides – and as such, if the smoke wafted into a neighbor’s home, whether through a door, a vent or an open window, then that neighbor could complain to the county’s Department of Environmental Protection.

The council was further quick to rationalize that such a decision did not infringe on citizens’ basic property rights because, according to Council Member Isaiah Leggett: “This [vote] does not say that you cannot smoke in your house. What it does say is that your smoke cannot cross property lines.”

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Fortunately, given the huge amount of local, national and, indeed, even international ridicule heaped upon Montgomery County in the wake of this proposed ordinance, the county executive realized this was a political stinker and vetoed it.

If the case is examined more closely, we find it really had nothing to do with weighing the pros and cons of tobacco, which as of this writing is still a lawful product, but was, instead, about the state's ability to regulate, and even intrude into, citizens' lives based on a subjective and arbitrary standard.

In the interests of full disclosure, I must admit that I myself hold conflicting views about tobacco. On one hand, I find cigarettes – which, in my opinion are nothing more than cheap tobacco, sawdust and chemical spray rolled into a piece of treated paper to ensure an even, yet rapid burn – particularly nauseating, especially when someone lights up when I am trying to eat.

On the other hand, however, I am a regular smoker of cigars and pipe tobacco.

How do we define “offensive?”

Not all noses are the same. I can think of a whole bunch of smells that reasonable minds could consider to be both “toxic” and “offensive” that I can produce in my house that have absolutely no nexus to tobacco.

For example, I frequently barbecue and slow-smoke meats and fish in my back yard. I always use wood charcoal. The smoke that wafts from my backyard contains numerous harmful carbon molecules that, if inhaled, can cause a wide variety of health concerns. Yet, according to this new ordinance, I am free to barbecue away to my heart's content.

The same hypocrisy applies to cleaning supplies. These products are extremely useful if used in small amounts, but overuse of bleach and other cleaning supplies can cause eyes to run, lungs to cough and so forth.

There is no ban on overuse of cleaning supplies. If my neighbors nonetheless find these smells offensive, then can I get out of the \$750 fine by claiming a temporary insanity plea?

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Second, even if we assume that tobacco is on the exact same level as harmful pollutants such as asbestos, radon, molds or pesticides, it is important to understand the amount of these toxins permitted in the atmosphere is heavily regulated and monitored down to parts per million.

Moreover, these levels were set using scientific rule-making procedures that were open to public notice and comment. The importance of these administrative rulemakings cannot be discounted, because only by ensuring procedural due process does the Environmental Protection Agency and like agencies avoid a constitutional “takings” claim – *i.e.*, the government has improperly “taken” the fair use of personal property without just compensation.

Montgomery County’s “moving target” ordinance rejected these due process concerns, however, as it was an arbitrary per se rule with no analytical framework.

Finally, the subjective nature of the proposed ordinance provided nothing more than yet an additional mechanism for vindictive and litigious neighbors to wage war on each other, clogging the courts with more frivolous claims.

Those people who live on farms “up county” have far less to worry about trespassing tobacco smoke than those people who live in Multiple Dwelling Units “down county” who, by definition, will be more likely to face tobacco smoke crossing property lines by wafting through the ventilation systems. Do we really want to see the creation of secret apartment building “sniff spies” to rat out would-be offenders? I don’t think so.

In sum, public health and safety oversight is a key role for government, and effective building codes are certainly no exception to this rule. However, as all regulation has costs and benefits, a careful analysis must be made before government decides to intervene. In the case of Montgomery County, no such analysis ever took place – instead, all that occurred was an attempt to breach the safeguards of civil liberties in order to promote the fashions of the moment.

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