Local regulation - sale of vaping devices to ages 18-20

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Subject:
Local regulation - sale of vaping devices to ages 18-20

October 21, 2020

Mr. Samuel S. Goren
City Attorney
Mr. Jacob G. Horowitz
Assistant City Attorney
City of Pembroke Pines
3099 E. Commercial Blvd., Suite 200
Fort Lauderdale, Florida 33309

Dear Mr. Goren and Mr. Horowitz,

This office has received your inquiry on behalf of the City Commission of the City of Pembroke Pines (the "City"), asking substantially the following question:

> Can the City either completely ban the sale of vapor generating electronic devices within the geographical boundaries of the City of Pembroke Pines, or, alternatively, prohibit the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty?

In sum:

> Although a complete ban on the sale of vapor generating electronic devices would conflict with section 775.082, Florida Statutes, an ordinance prohibiting the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, would not conflict with that statute; provided, however, that the municipal ordinance penalties should not exceed state penalties for similar offenses.

Background Facts
In your submittal letter, you indicate that, "[g]iven the recent proliferation of vaping in general, and among teenagers in particular, the City Commission has expressed an interest in banning the sale of vapor generating electronic devices within the City." This has prompted the City to ask whether, consistent with Florida law, it can ban the sale of such devices within City limits altogether. In the alternative, the City asks whether it can prohibit the sale of such devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and

twenty.1

Analysis

A municipality may exercise governmental power, “except as otherwise provided by law.”2 Municipalities are authorized to enact legislation concerning any subject matter upon which the state Legislature may act, except any “subject expressly preempted to state or county government by the constitution or by general law.”3

Section 877.112, Florida Statutes, regulates the purchase and sale of nicotine products and nicotine dispensing devices. The regulatory framework contained in section 877.112 consists, briefly, of:

· Definitions of “nicotine product” and “nicotine dispensing devices;”
· Prohibitions on the sale or delivery of such products to persons under the age of 18, providing criminal penalties;

· Affirmative defenses when a buyer or recipient misrepresents his or her age;

· Prohibitions on possession of the products and non-criminal penalties;

· Signage requirements for dealers of the products; and

· A prohibition of self-service merchandising of the products unless they are under the direct control or line of sight of the retailer.

A “nicotine dispensing device” is defined in the statute to mean, in pertinent part, “any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product...or other similar device or product.” Thus, the statute regulates the “vapor generating electronic devices” whose sale the City proposes to further restrict.

The threshold question is whether section 877.112, Florida Statutes, preempts local legislation in the area. Section 877.112 contains no provision expressly preempting county or municipal ordinances. But even in a field where both the State and local government can legislate concurrently, a municipality cannot enact an ordinance that directly conflicts with a state statute.4 Generally, it is “not a conflict if an ordinance is more stringent than a statute.”5 Nor does conflict exist simply because the ordinance “regulates an area not covered by the statute.”6 However, a “municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.”7

Section 877.112, expressly prohibits the sale of vapor generating electronic devices to persons under the age of eighteen. The statute is silent regarding sales of such devices to persons between the ages of eighteen and twenty.

Nor will section 877.112 be construed to create any “right” or “privilege” to purchase such

devices applicable to persons in those age groups, in light of federal law universally prohibiting the sale of such devices to anyone under the age of twenty-one.8 Under the specific circumstances applicable here, one cannot conclude that the Legislature--in omitting the sale of nicotine dispensing devices to persons between the ages of eighteen and twenty from the ambit of unlawful acts9 proscribed by section 877.112--has thereby made such transactions “lawful,” or created any “right” or “privilege” to engage in them.10 Instead, section 877.112 operates concurrently, and does not conflict, with federal law that makes the sale of such devices to persons under the age of twenty-one unlawful.11

Based on these principles, the City would not be precluded by state law from enacting an ordinance prohibiting the sale of vapor generating electronic devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, within the geographical boundaries of the City of Pembroke Pines.12 The same conclusion does not apply, however, to a proposed total ban on the sale of such devices.

A local law on a subject will conflict with any of the provisions of the state law on the same subject if a person acting to comply with one provision necessarily violates another.13 If the City’s proposed more restrictive ordinance (not a total ban) is carefully crafted, then, in conducting sales transactions, a retailer selling vapor generating electronic devices would be able to comply with both section 877.112 and the local law. The same cannot be said regarding an ordinance totally banning the sales of such devices, where a local retailer’s compliance with section 877.112 would necessarily result in a violation of the City’s ordinance.

Conclusion

Based on the foregoing, it is my opinion that the City would not be precluded by state law from enacting an ordinance prohibiting the sale of vapor generating electronic devices not only to persons under the age of eighteen, but also to persons between the ages of eighteen and twenty, within the geographical boundaries of the City of Pembroke Pines. However, an ordinance imposing a total ban on the sale of such devices within the City’s boundaries would conflict with section 877.112 and would thus not be authorized under Florida law.

Sincerely,

Ashley Moody
Attorney General

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1 This opinion does not address the effect of the express federal preemption provision for tobacco products contained in the Family Smoking Prevention and Tobacco Control Act (“Act”) on the City’s ability to regulate sales in this area. *See*21 U.S.C. § 387p(a)(2)(A) However, in crafting its proposed ordinance (a copy of which was not provided to this office), the City should be mindful of the Act, which is codified at 21 U.S.C. § 301, *et seq*.

2 Art. VIII, § 2(b), Fla. Const. (1968).
3 § 166.021(3), Fla. Stat. (2019).

4 *See Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008); *accord Thomas v. State*, 614 So. 2d 468, 470 (Fla.1993) ("Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute.").

5 *Hoesch v. Broward Cty.*, 53 So. 3d 1177, 1181 (Fla. 4th DCA 2011); *accord City of Kissimmee v. Fla. Retail Fed'n, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005).

6 *Id.*

7 *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla.1972).

8 On December 20, 2019, the President signed into law legislation that raised the federal minimum age for sales of tobacco products from eighteen to twenty-one years. The Further Consolidated Appropriations Act, 2020 (H.R. 1865) included a provision amending section 906(d) of the Federal Food, Drug, and Cosmetic Act to increase the federal minimum age to purchase tobacco products from eighteen to twenty-one, and to add a provision making it unlawful for any retailer to sell a tobacco product to any person younger than twenty-one years of age. *See* 360,064 Guidance Ctp, April 30, 2020 — Enforcement Priorities for Electronic Nicotine Delivery Systems (ends) and Other Deemed Products On the Market Without Premarket Authorization (revised), Food Drug Cosm. L. Rep. P 360064 (available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-priorities-electronic-nicotine-delivery-system-ends-and-other-deemed-products-market).

9 *Cf. Thomas v. State*, 614 So. 2d at 469-70 (concluding that a city could not enforce its ordinance requiring safety equipment on bicycles ridden in the city by arresting violators where the state statute imposed non-criminal penalties for similar conduct).

10 Thus, section 743.07, Florida Statutes (pertaining to the "[r]ights, privileges, and obligations of persons 18 years of age or older") is not implicated by a proposal to regulate by ordinance the sale of vapor generating electronic devices to persons between the ages of eighteen and twenty.

11 "[S]tate laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399–400 (2012). "This includes cases where 'compliance with both federal and state regulations is a physical impossibility,'...and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting from *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (additional citations omitted).

12 However, this office has previously opined--and the Florida Supreme Court has agreed--that, in enacting concurrent municipal regulations, "ordinance penalties may not exceed state penalties for similar or identical offenses." *Thomas v. State*, 614 So. 2d 468, 473 (Fla. 1993) (citing Op. Att'y Gen. Fla. 089-24 (1989); Op. Att'y Gen. Fla. 081-76 (1981)); *see also Phantom*

of Clearwater, Inc. v. Pinellas Cty., 894 So. 2d 1011, 1021 (Fla. 2d DCA 2005) *(*"The final sentence of this provision, however, which provides that the sanctions in section 62–82(1), as amended, "are in addition to any criminal penalty which is available under the provisions of Chapter 791," presents a conflict.").

13 *See Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1161 (Fla.1989) ("Putting it another way, a conflict exists when two legislative enactments 'cannot co-exist.'") (quoting *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 522 So. 2d 852, 856 (Fla. 3d DCA 1987)) (citation omitted).