Nicotine products and dispensers - preemption

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Dear Ms. Sidman:

On behalf of the City of Jacksonville, you have requested an opinion regarding whether, consistent with section 877.112, Florida Statutes (2018), the City may regulate the sale of nicotine products and nicotine dispensing devices. In asking this question, you have not described the regulatory measures the City might propose to enact. Attorney General Bondi has asked that I respond to your letter.

Pursuant to its charter, the consolidated government of the City of Jacksonville "is a county or a municipality for all purposes of general law." *Jackson v. Consol. Gov't of City of Jacksonville*, 225 So. 2d 497, 503 (Fla. 1969). "The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law,"[1] and "[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."[2] The question presented, therefore, is whether local regulation of the sale of nicotine products and nicotine dispensing devices is inconsistent with general law.

As a preliminary matter, these informal comments do not address the effect of the express federal preemption provision for tobacco products on the City's ability to regulate sales in this area.[3] The Food and Drug Administration (FDA) determined in a rule that the term "tobacco products" includes e-cigarettes (nicotine products and nicotine dispensing devices).[4] *See generally In re Fontem, U.S., Inc. Consumer Class Action Litigation*, 2016 WL 6520142 (C.D. Cal. Nov. 1, 2016) (reflecting that, as a result of the FDA final rule deeming e-cigarettes to be tobacco products falling under the Family Smoking Prevention and Tobacco Control Act ["Act"],[5] the Act's restrictions are preemptive with respect to how such products can be sold and what warnings are required on products and advertisements). The federal preemption provision may have an impact on the City's proposed ordinance, depending on its scope.

Section 877.112, enacted in 2014, predates the FDA rule and does not appear to be preempted by the federal Act, because in issuing its final rule, the FDA stated that "[n]o state or local laws in effect at the close of the public comment period were identified that FDA determined would be preempted by this final rule."[6] Our focus, then, is on whether section 877.112 precludes local government from imposing any regulation in the area of nicotine products and nicotine

dispensing devices.

The heading[7] of section 877.112 states: “Nicotine products and nicotine dispensing devices; prohibitions for minors; penalties; civil fines; signage requirements; *preemption*.” (Emphasis added.) There is no further mention of preemption in the statute. In contrast, in each of the other 40-odd Florida statutes in which the word “preemption” occurs in the section heading and/or in the text, there is also a provision in the text expressly describing the scope of the preemption, or, sometimes, that no preemption is intended. There is no such provision in the body of section 877.112.

Accordingly, the term “preemption” in the heading of section 877.112 does not establish “express preemption,” because that is accomplished by clear language stating the intent to reserve an entire field or a particular topic for exclusive legislative regulation; its scope cannot be inferred.[8] As the Florida Supreme Court has stated: “In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.”[9]

When a statute does not contain language of express preemption, it must be determined whether local legislation is precluded through implied preemption. “Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme.”[10] The Florida Supreme Court has cautioned, however, that “we must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers.”[11]

With regard to section 877.112, whether preemption may be implied is problematic, because the history of the statute’s passage shows that proposed preemption language was intentionally excluded from the text of the final bill. “[I]f the phraseology of the act is ambiguous or is susceptible of more than one interpretation, it is the court's duty to glean the legislative intent from a consideration of the act as a whole, ‘the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject.’” *Parker v. State*, 406 So. 2d 1089, 1092 (Fla. 1981) (quoting *Foley v. State*, 50 So. 2d 179, 184 (Fla. 1951)).

Neither of the original versions of the bill in the House of Representatives (HB 169) and the Senate (SB 224) contained the term “preemption.” It appeared first in the House version, CS/CS/HB 169 (dated 3/31/2014), which consisted of an amendment to section 569.14, Florida Statutes, dealing with signage for tobacco products, and a new statute, section 877.112. The Legislature included “preemption” in the section headings and express preemption provisions in the text of both sections 569.14 and 877.112.[12] Preemption was also included in the title of the bill which stated, with regard to each provision, that the bill was “preempting regulation of certain products and activities to the state.”

The Senate version, SB 224, did not contain any preemption language until CS/CS/SB 224 1st engrossed (approved for filing 4/21/2014). In it, the amended section 569.14 did not have “preemption” in the section heading, nor was there an express preemption provision in the body of the statute, but the new section 877.112 did have “preemption” in the section heading and a

provision outlining the scope of the preemption in the body of the statute.[13] Thereafter, several amendments were offered, including an amendment removing the preemption provision from the body of section 877.112, and another amendment adding a provision that stated: “This section does not preempt or supersede any municipal or county ordinance regulating the sale of nicotine products or nicotine dispensing devices that does not directly conflict with this section.” The final version of the bill enacted by both houses, CS/CS/SB 224, chapter 2014-65, does not mention preemption in the title, nor does it in the heading or the body of the amendment to section 569.14, but it does retain the word in the heading of section 877.112, although there is no preemption provision in the body of section 877.112.

Finally, there is no mention of preemption in the final Staff Analyses of either house.[14]

To summarize, the Legislature enacted section 877.112 with the term “preemption” in the section heading. Yet, as shown above, the meaning of that term standing alone in the heading is ambiguous at best.[15] There is no express provision within the body of the statute, unlike every other Florida statute with “preemption” in the heading. Preemption was part of the statutes in preliminary versions of the House and Senate bills, but it appears that when the versions were combined, the term was removed from the title of the bill, the body of both sections 569.14 and 877.112, and the heading of section 569.14, and it remained solely in the heading of section 877.112.

It would thus be problematic for this office to engage in an analysis of whether the statute impliedly preempts local legislation in the particular area when the Legislature explicitly declined to retain a preemption provision in the body of the statute. As the First District stated in *Phantom of Clearwater, Inc. v. Pinellas County*:

“Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive. Courts are understandably reluctant to preclude a local elected governing body from exercising its local powers. As well explained by Judge Wolf in *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center, Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996), if the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute.”[16]

In the alternative, the court continued, “[i]n the absence of express preemption, normally a determination based upon any direct conflict between the statute and a local law … is adequate to solve a power struggle between existing statutes and newly created ordinances.”[17] Accordingly, under the circumstances described herein, this office concludes that the latter approach is the most appropriate: that the City is not precluded from enacting a local ordinance so long as it does not conflict with any of the provisions within section 877.112.

The regulatory framework set forth in section 877.112 consists of, briefly:

· Definitions of “nicotine product” and “nicotine dispensing devices”;
· Prohibitions on sale or delivery of such products to minors under the age of 18 and 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;
· Prohibition of self-service merchandising of the products unless they are under the direct control or line of sight of the retailer.

A local law on this subject will conflict with any of the provisions of the state law if a person acting to comply with one provision necessarily violates another provision.[18] “A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.”[19]

Consequently, any ordinance proposed by the City of Jacksonville may address matters that do not conflict with the provisions of section 877.112. It should be noted that “if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute.”[20]

I trust that these informal comments will be helpful.

Sincerely,

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Senior Assistant Attorney General

EBG/tsh

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[1] Art. VIII, § 1(g), Fla. Const.

[2] Art. VIII, § 2(b), Fla. Const.

[3] 21 U.S.C. § 387p(a)(2)(A) provides: “No state or political subdivision of a state may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk products.”

[4] *See* FDA final rule, titled “Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products,” 81 Fed. Reg. 28974 (May 10, 2016) (codified at 21 C.F.R. pts. 1100, 1140, 1143).

[5] The Family Smoking Prevention and Tobacco Control Act is codified as a subchapter of the Federal Food Drug and Cosmetic Act, 21 U.S.C. § 301, et seq.

[6] *See* Final Rule, 81 Fed. Reg. 28974, 28989.

[7] Use of the term, “heading,” rather than ”title,” requires some explanation. In your

memorandum you cite a judicial opinion and an Attorney General opinion for the proposition that the title of a law should not control the meaning of a statute that is otherwise free from ambiguity. *See Kaisner v. Kolb*, 543 So. 2d 732, 738 (Fla. 1989); Op. Att'y Gen. Fla. 83-7 (1983). In those opinions, however, "title" describes the prefatory language at the beginning of a bill that enumerates the provisions contained in the body of the bill. As the Florida Supreme Court explained in *State v. Kaufman*, 430 So. 2d 904, 906-07 (Fla. 1983), bills have three titles,

"the caption title, i.e., 'SB 83;' the short title, i.e., ' An act relating to possession of controlled substances;' and a full title, i.e. SB 83—A bill to be entitled An act relating to possession of controlled substances; adding s. 893.13(1)(h), Florida Statutes; requiring that persons convicted of possession of more than 100 pounds of cannabis be sentenced to and be required to serve a minimum of 3 years' imprisonment; providing an effective date."

The court has observed that "the title of an act is not a part of the basic act, as the operative provisions are those which follow the enabling clause, but the title has the important function of defining the scope of the act." *Finn v. Finn*, 312 So. 2d 726, 730 (Fla. 1975). The terms "heading," section heading," or "catchline," are commonly used to refer to the description that follows the section number of a statute. *See, e.g., Merritt Square Corp. v. Dep't of Revenue*, 354 So. 2d 143, 144 (Fla. 1st DCA 1978) and Op. Att'y Gen. Fla. 78-129 (1978), *infra* n. 13. I will use these terms as used in the authorities cited above.

[8] *See D'Agastino v. City of Miami*, 220 So. 3d 410, 421 (Fla. 2017); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 1st DCA 2005).

[9] *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

[10] *Id. See also D'Agastino*, 220 So. 3d at 421 ("[B]ecause the Legislature is ultimately superior to local government under the Florida Constitution, preemption can arise even where there is no specifically preclusive language."); *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013) ("'[P]reemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.'") (quoting *Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989)).

[11] *D'Agastino*, 220 So. 3d at 421.

[12] Section 569.14(7) provided: "This subsection expressly preempts to the state the regulation of products and activities under this chapter and supersedes any municipal or county ordinance on the subject." Section 877.112(11) provided: "This subsection expressly preempts to the state the regulation of products and activities under this section and supersedes any municipal or county ordinance on the subject." Fla. House of Rep. CS/CS/HB 169 (dated March 17, 2014).

[13] Section 877.112(13) provided: "This subsection expressly preempts to the state the regulation of the sale of products under this section and supersedes any municipal or county ordinance on the subject enacted on or after July 1, 2014." Fla. Senate CS/CS/SB 224, 1st Eng. (dated April 21, 2014).

[14] The House Staff Analysis mentioned the preemption provision in relation to an earlier

version of the bill, House of Rep. Staff Analysis, CS/CS/CS/HB 169 (dated March 31, 2014), but the final staff analysis does not mention preemption, House of Rep. Final Bill Analysis CS/CS/CS/HB 169 (dated June 17, 2014). The Senate staff analyses do not mention preemption in relation to any versions of SB 224.

[15] *See Merritt Square Corp. v. Dep't of Revenue*, 354 So. 2d 143, 144 (Fla. 1st DCA 1978) (the text of section 203.01 required a private utility to pay a tax on gross receipts for electricity, although the section heading or catchline was labeled "*public service corporations*, tax upon gross receipts," leading the appellate court to observe that this "misleading catchline has appeared repeatedly" in the statute for 37 years, and was in the title of the bill, but that the misleading catchline and title were "not part of and do not modify the unambiguous text of the statute"). *Cf.* Op. Att'y Gen. Fla. 78-129 (1978) (although § 136.07 was admittedly ambiguous regarding publication of a monthly statement by the board of county commissioners, the language in the section heading or catchline requiring publication of a monthly statement was part of the Legislature's amendment to the statute, and thus would be given weight and effect in combination with the text within the statute dealing with monthly publication).

[16] *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1019 (Fla. 1st DCA 2005).

[17] *Id. See also Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993) (observing that when the state and a municipality regulate in the same area because the state has not preemptively occupied the field, the "municipality's concurrent legislation must not conflict with state law.").

[18] *Sarasota Alliance*, 28 So. 3d at 888.

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

[20] *Id.*