Municipalities, noise ordinance

Number: INFORMAL

Date: December 03, 2007

The Honorable Maria Lorts Sachs
Representative, District 86
Florida House of Representatives
203 Northeast 1st Avenue
Delray Beach, Florida 33444

Dear Representative Sachs:

Thank you for contacting the Florida Attorney General's Office regarding a noise ordinance proposed by the City of Delray Beach. Attorney General McCollum has asked me to respond to your letter.

After reviewing the information you have submitted, it does not appear that this is a matter upon which this office may formally comment at this time. The Florida Attorney General is statutorily limited to providing legal opinions and advice to governmental agencies and officers on questions of state law relating to their own duties.[1] In situations where the question requires comment on the authority of a governmental entity, such as a municipality, a majority of the members of that governmental body must make the request for an Attorney General's Opinion.[2] This office will not comment on the authority of one governmental agency at the request of another.

Further, this office has no authority to review proposed legislation for legal sufficiency nor are we authorized to comment on local charter provisions or ordinances.[3] Thus, no comment is made on the particular terms of the legislation being considered by the City of Delray Beach. However, this office can generally address the extent of municipal home rule as it relates to the adoption of local ordinances and will note general issues of concern for your consideration.

Section 2(b), Article VIII of the Florida Constitution provides, in part:

"Municipalities 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."

The Florida Supreme Court has stated that this constitutional provision "expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services."[4] The Court stated, in *State v. City of Sunrise*, that the only limitation on the power of municipalities under this constitutional section is that such power must be exercised for a valid municipal purpose. As determined by the Court, "[l]egislative statutes are relevant only to determine limitations of authority" and municipalities need no further authorization from the Legislature to conduct municipal government.[5]

Pursuant to section 166.021(1), Florida Statutes, municipalities are granted "the 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 when expressly prohibited by law." Section 166.021(3), Florida Statutes, prescribes limitations on the subjects that municipal legislation may address, and provides:

"(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
(b) Any subject expressly prohibited by the constitution;
(c) Any subject expressly preempted to state or county government by the constitution or by general law; and
(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution."

The interaction between local and state legislation was specifically discussed by the Florida Supreme Court in *City of Miami Beach v. Rocio Corporation*:

"The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails. An ordinance which supplements a statute's restriction of rights may coexist with that statute, whereas an ordinance which countermands rights provided by statute must fail."[6]

The City of Delray Beach, therefore, may legislate on any matter upon which the Legislature may act, so long as its ordinance does not forbid what the Legislature has expressly licensed or authorized, or permit what the Legislature has expressly forbidden.[7]

The issue of conflict between local ordinances and state law was addressed in *Jordan Chapel Freewill Baptist Church v. Dade County*.[8] The court in *Jordan Chapel* stated that:

"Legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. . . . [T]he sole test of conflict for purposes of preemption is the *impossibility* of co-existence of the two laws. Courts are therefore concerned with whether compliance with a County ordinance *requires* a violation of a state statute or renders compliance with a state statute impossible."[9] (emphasis in original)

The Florida Uniform Traffic Control Law, Chapter 316, Florida Statutes, was enacted "to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities."[10] While a municipality may control certain traffic movement or parking in its jurisdiction, section 316.002, Florida Statutes, makes it clear that any such authority is "supplemental to the other laws or ordinances of this chapter and not in conflict therewith." This section goes on to state that it is unlawful for any local authority, which includes municipalities, to pass or to attempt to enforce any ordinance in conflict with the provisions of

Chapter 316.[11]

This office has issued a number of opinions relating to municipal regulation under Chapter 316, Florida Statutes, and you may review these opinions by visiting our website at www.myfloridalegal.com. This is a searchable database of Attorney General Opinions dating from 1974 and you may search using either a statutory citation, such as "316.007" or a search term, such as "noise" or "traffic control." You may also wish to contact the Florida Department of Highway Safety and Motor Vehicles to request their input on this matter. The department is the state agency charged with interpreting the Uniform Traffic Code and adopting administrative rules to implement the provisions of Chapter 316, Florida Statutes.

My review of previously issued Florida Attorney General Opinions relating to noise abatement reflects one opinion that may be of interest to you. Attorney General's Opinion 2005-58 (copy enclosed) deals with noise abatement and boating, but may provide some direction to you relating to the scope of local governmental authority over the issue of noise regulation.

I trust that these informal comments will be helpful to you. Thank you for contacting the Florida Attorney General's Office for assistance.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/t

Enclosure

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[1] *See* s. 16.01(3), Fla. Stat.

[2] *See* Department of Legal Affairs Statement Concerning Opinions (copy enclosed).

[3] *Supra* n.1 and 2.

[4] *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978).
[5] *Supra* at 1209. *See also, City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974).

[6] *City of Miami Beach v. Rocio Corporation*, 404 So. 2d 1066, 1070 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981).

[7] *See generally* 12 Fla. Jur. 2d *Counties and Municipal Corporations*, s. 187.

[8] 334 So. 2d 661 (Fla. 3d DCA 1976). *And see City of Kissimmee v. Florida Retail Federation, Inc.*, 915 So. 2d 205 (Fla. 5th DCA 2005) (generally the fact that local legislation imposes

additional requirements on a person or business is not evidence of conflict): *F.Y.I. Adventures v. City of Ocala*, 698 So. 2d 583 (Fla. 5th DCA 1997) (if no issue of preemption, conflict with state statute is given a very strict and limited meaning; they must contradict each other in the sense that both legislative provisions cannot co-exist, i.e., in order to comply with one, a violation of the other is required).

[9] *Id.* at 664.

[10] Section 316.002, Fla. Stat.

[11] *See also* s. 316.007, Fla. Stat., stating that the provisions of Ch. 316, Fla. Stat., are to be applicable and uniform throughout the state and in all political subdivisions and municipalities therein and that "no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized." *Cf.* s. 166.021, Fla. Stat. (municipality prohibited from exercising any power for municipal purposes or enacting any municipal legislation when expressly prohibited by law or when the subject matter is expressly preempted to the state by general law); *City of Miami Beach v. Rocio Corporation*, 404 So. 2d 1066 (Fla. 3d DCA 1981), *petition for review denied*, 408 So. 2d 1092 (Fla. 1981) (municipal ordinances are inferior to state law and must fail when conflict arises).