

Municipalities, regulation of smoking

Number: INFORMAL

Date: July 26, 2002

Mr. Mark Goldstein
City Attorney
City of Hallandale Beach
400 South Federal Highway
Hallandale Beach, Florida 33009

RE: SMOKING--MUNICIPALITIES--regulation of smoking inside and outside preempted to state.
Pt. II, Ch. 386, Fla. Stat.

Dear Mr. Goldstein:

You have asked whether a city may enact an ordinance prohibiting smoking in certain outdoor areas, such as parks, play areas and baseball stands.

In sum, a city may not enact an ordinance prohibiting smoking in certain outdoor areas, in light of current Florida law preempting the regulation of smoking to the state. Any municipal ordinance on the subject, therefore, would be void and of no effect.

Part II, Chapter 386, Florida Statutes, is entitled "Indoor Air: Tobacco Smoke" and is known as the "Florida Clean Indoor Air Act." [1] The Legislature has expressed its intent to "protect the public health, comfort, and environment by creating areas in public places and at public meetings that are reasonably free from tobacco smoke by providing a uniform statewide maximum code." [2]

The term "[p]ublic place" is defined to mean "*enclosed, indoor areas used by the general public*" (e.s.) such as government buildings, public mass transportation, elevators, hospitals, nursing homes, educational facilities, public school buses, libraries, courtrooms, jury waiting and deliberation rooms, museums, theaters, auditoriums, arenas, recreational facilities, restaurants, retail stores (except tobacco shops), grocery stores, places of employment, health care facilities, day care centers and common areas of retirement homes and condominiums. [3]

The title of this part of the Florida Statutes, as well as the definition of "public place," would indicate that the provisions of the act apply only to the regulation of smoking in indoor places. While the title of an act is one indicator of the Legislature's intent and may be used to define the scope of the act, [4] in this instance the Legislature has provided a much broader application of the act in section 386.209, Florida Statutes, stating:

This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.

The plain language of this preemptory provision makes it clear that the state, not local governments, regulates smoking wherever it may occur. As evidence of the Legislature's intent

to regulate smoking other than exclusively in indoor areas, the act contains a provision that makes it unlawful for any person under the age of 18 to smoke tobacco "in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight." [5]

Clearly, the Legislature has used Part II, Chapter 386, Florida Statutes, as the means to regulate smoking inside and outside a public place. It would appear, therefore, that any attempt by a city to regulate smoking by ordinance in a manner other than that prescribed by the Legislature would be preempted and of no effect.

Sincerely,

Joslyn Wilson
Senior Assistant Attorney General

JW/tls

[1] Section 386.201, Fla. Stat.

[2] Section 386.202, Fla. Stat.

[3] Section 386.203(1), Fla. Stat.

[4] See *Finn v. Finn*, 312 So. 2d 726 (Fla. 1975); *State v. Parker*, 406 So. 2d 1089 (Fla. 1981) (one indicator of Legislature's intent is the title of the law enacting the statute); *and Op. Att'y Gen. Fla. 99-67* (1999).

[5] Section 386.212(1), Fla. Stat. See also s. 386.205(6), Fla. Stat., authorizing each state agency to adopt rules for the administration of the act. Examples of such rules are in Rule 65C-22.002(1)(h), Fla. Admin. Code, prohibiting smoking "within the child care facility and all outdoor play areas" and Rule 33-601.721(7), Fla. Admin. Code, governing correctional facility visitation operations, stating that "[s]moking shall be permitted only in an outdoor smoking area designated by the warden."