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September 9, 2015

Honorable Richard J. Codey
66 W. Mount Pleasant Ave.
Livingston, New Jersey 07039

Dear Senator Codey:

You have requested a legal opinion regarding whether State law, specifically N.J.S.A. 2A:170-51.4, preempts a municipality from adopting an ordinance that raises the age at which a person may be lawfully sold tobacco within its boundaries above the legal minimum age established by that statute. As indicated by your district office and recent reports by the media, several New Jersey municipalities have already adopted, or are considering adopting, ordinances raising the minimum age for the lawful sale of tobacco to 21, above the current minimum age of 19 under State law.

Summary Answer

In short, a municipality would not be prohibited from establishing a higher minimum age for the lawful sale of tobacco within its boundaries because State law does not evince a clear legislative intent to foreclose further municipal regulation in the area of tobacco sales.

Applicable State Statutes

N.J.S.A. 2A:170-51.4 prohibits the conveyance of tobacco and certain related smoking products to a person under 19 years of age, and establishes civil penalties for violations of that prohibition. There is another statute, N.J.S.A. 2C:33-13.1, that also prohibits the very same conveyances, but which establishes criminal penalties for violations. Since they both cover the same conduct, both statutes must be considered to completely assess the preemption question presented. Neither of these statutes, nor any other statutes, expressly authorize or prohibit municipal action to set a higher minimum age for the lawful conveyance of tobacco.

General Principles of State Preemption of Municipal Ordinances

The doctrine of preemption is “based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State.” Overlook Terrace Mgmt. Corp. v. Rent Control Bd., 71 N.J. 451, 461 (1976) (citation omitted). This limitation on municipal authority is enshrined in the State Constitution, which provides that municipalities may exercise those powers that are expressly conferred by law, and those powers of necessary or fair implication, or incident to those expressly conferred powers, which are “not inconsistent with or prohibited by this Constitution or law.” N.J. Const. Art. IV, Sec. VII, par. 11.

There are a number of ways in which a municipal ordinance may be preempted as contrary to State law. The various grounds for preemption were expressed by the Supreme Court of New Jersey in the following questions, identified as pertinent to a preemption analysis:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

[Overlook Terrace, 71 N.J. at 461-462 (1976) (citations and internal quotations omitted).]

While a municipality may not legislate contrary to State law, “the Legislature's intent to prevent local initiatives must appear clearly.” Dome Realty, Inc. v. City of Paterson, 83 N.J. 212, 232 (1980). Thus, whether the Legislature has legislated upon the subject does not alone resolve a preemption question. Ibid. (citations omitted). Rather, “the question is whether the Legislature intended its action to preclude the exercise of the delegated police

power,” such that “it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.” Ibid. This is consistent with the State Constitution’s directive that its provisions and other State laws concerning municipalities are to be “liberally construed in their favor.” N.J. Const. Art. IV, Sec. VII, par. 11.

Preemption Analysis of a Municipal Ordinance Prohibiting Tobacco Sales to Persons Under 21

Although there is no case law specifically addressing whether a municipal ordinance that prohibits tobacco sales to 19 and 20 year olds is preempted by State law, there is one case, C.I.C. Corp. v. Twp. of East Brunswick, that addressed whether a municipal ordinance more restrictive than State law on the subject of tobacco sales was preempted. 266 N.J. Super. 1 (App. Div. 1993), aff’d, 135 N.J. 121 (1994). The ordinance at issue in that case banned all cigarette vending machines in the municipality to prevent minors from accessing cigarettes. Id. at 3. The court upheld the ordinance against challenges that it was preempted by State law bans on cigarette vending machines on school property and tobacco sales to minors, as well as the State’s broad licensing and taxing scheme for cigarette sellers. Id. at 10-11.¹

The court rejected the first argument on the lack of evidence of legislative intent that the limited vending machine prohibition in schools “was to be to the exclusion of more restrictive local measures.” Id. at 11 (citation omitted). The second argument was rejected on the grounds that the statutory ban on tobacco sales to minors did not deal with vending machines at all, and that the more restrictive vending machine ordinance was consistent with the statute’s purpose of preventing tobacco sales to minors. Ibid. The licensing and taxing scheme argument was rejected because that scheme served an entirely different purpose, raising revenues and controlling abuses arising from non-licensed sale of cigarettes, than the health, safety, and welfare purpose of preventing cigarette sales to minors. Id. at 10-11 (citation omitted). The court also held that the statutes did not “evinced a legislative intent to preempt the field,” id. at 11, did not comprehensively or exhaustively regulate the use of vending machines, and that the sale of cigarettes to minors was as much a matter of local concern as one of statewide concern, responses to which could vary locally in both nature and intensity without interfering with State law. Id. at 9, 12 (citation omitted).

¹ The ban cited by the court on cigarette vending machines on school property is set forth in N.J.S.A. 18A:36-32. The ban cited on tobacco sales to minors was, at the time, set forth in the since-repealed N.J.S.A. 2A:170-51. The licensing and taxing scheme for cigarette sellers consist of the “Cigarette Tax Act,” N.J.S.A. 54:40A-1 et seq., and the “Unfair Cigarette Sales Act of 1952,” N.J.S.A. 56:7-18 et seq. C.I.C., 266 N.J. Super. at 10-11.

The opinion in C.I.C. is instructive to the preemption analysis of a municipal ordinance banning tobacco sales to persons under 19 in a number of ways. First, the opinion indicates that the State law licensing and taxing scheme for cigarette sellers would not preempt a health, safety, and welfare municipal regulation of those sellers. Second, it also indicates that tobacco sales to young persons is not a matter that demands uniform treatment Statewide, and that local treatment of that subject may reflect varying community standards without substantial problem. Third, it affirms, in a relevant context, the general principle that a limited State law prohibition does not preempt a more restrictive municipal regulation absent evidence of a legislative intent to do so. However, a ban on tobacco sales to 19 and 20 year olds implicates different statutes and policies than a cigarette vending machine ban, so a complete preemption analysis under the five Overlook Terrace questions is warranted.

Turning to the first Overlook Terrace question, for a municipal ordinance to conflict with State law, it would have to either permit conduct prohibited by State law or prohibit conduct expressly authorized by State law. Mack Paramus Co. v. Mayor and Council of Paramus, 103 N.J. 564, 576 (1986). In Mack, the Supreme Court of New Jersey held that there was no such conflict between a State law which authorized local blue laws prohibiting certain activities on Sundays and a local blue law which prohibited additional activities on Sundays. Ibid. Specifically, the local blue law in question did not permit any of the activities prohibited by the State law, and the additional activities that it did prohibit were not activities State law expressly authorized to be conducted on Sundays. Ibid. Hence, the local blue law also did not prohibit any activities permitted by State law. Ibid.

N.J.S.A. 2A:170-51.4 and N.J.S.A. 2C:33-13.1 both prohibit selling and giving tobacco or related smoking products to a person under 19. Like the State law at issue in Mack, neither these statutes, nor any other statutes, expressly authorize the conveyance of these products to persons older than 19. Thus, a municipal ordinance prohibiting the conveyance of tobacco to 19 and 20 year old persons would not create a conflict under Mack because it would not permit the statutorily prohibited conveyance of tobacco to persons under 19, and it would not prohibit any activity expressly authorized by statute because the sale of tobacco to older persons is not an expressly authorized activity.

However, the conflict analysis under the first Overlook Terrace question does not end there with regard to N.J.S.A. 2C:33-13.1 because this statute is a part of the Code of Criminal Justice (hereinafter the "Code"), and a question of preemption by a Code provision is governed by special rules that may place additional limits on municipal authority. Club 35, L.L.C. v. Borough of Sayreville, 420 N.J. Super. 231, 235 (App. Div. 2011). Specifically, the Code prohibits local governments from acting in a manner inconsistent with a Code policy, "whether that policy be expressed by inclusion of a provision in the code or by *exclusion of*

that subject from the code.” N.J.S.A. 2C:1-5(d) (emphasis added). Thus, in contrast to a typical preemption conflict analysis, a conflict may arise even in the absence of an expressly contrary State law. To determine whether an unexpressed contrary policy is present, the overall structure of the Code and its pertinent legislative history must be considered. State v. Crawley, 90 N.J. 241, 245 (1982).

In Crawley, the absence of a general loitering provision from the Code was the basis for striking down a municipal loitering ordinance under this “preemption by exclusion” provision. Id. at 244. A legislative intent to decriminalize such conduct was inferred by the conspicuous absence of a loitering provision despite the Code’s “comprehensive intervention” into the area of “street conduct of the same class as loitering,” and by the repeal of an earlier criminal loitering statute not later reincorporated into the Code. Id. at 245-247 (citations omitted). By contrast, a municipal indecent exposure ordinance was not preempted by the Code’s lewd behavior provisions even though the Code did not address such other areas in the field of public nudity. Borough of Belmar v. Buckley, 187 N.J. Super. 107, 111 (App. Div. 1982). This holding was based on legislative history indicating that lewdness and indecency were treated as distinct categories of conduct and that the Code intended to “address only the former, leaving the latter to municipal regulation pursuant to and consistent with the scope of the delegated municipal police power.” Id. at 111-112.

A review of the statutory scheme and history does not yield a clear legislative intent with respect to the absence of a provision concerning the sale of tobacco to 19 and 20 years olds in the Code. In contrast to Crawley and akin to Buckley and Mack, the Code does not comprehensively intervene into the relevant subject matter since the only Code provision on permissible tobacco sales is N.J.S.A. 2C:33-13.1. Nor was there any change of relevant significance in the statutory history. Since its original enactment as P.L.1904, c.163, the criminal prohibition on tobacco sales to minors has been consistently limited, with no mention, condoning or otherwise, of sales to 19 and 20 years olds. There is also no indication that tobacco sales to adults were once prohibited by a since-repealed State criminal law that would reflect a legislative intent to decriminalize that activity. Furthermore, legislative findings recognizing a right to smoke in the context of smoking in public places were repealed by P.L. 2005, c. 383. Thus, in the absence of any clear legislative intent to specifically permit tobacco sales to 19 and 20 year olds, there should be no conflict between a municipal ordinance so prohibiting and N.J.S.A. 2C:33-13.1, as well as N.J.S.A. 2A:170-51.4 under the first Overlook Terrace question.

The foregoing analysis informs the inquiry under the second, fourth, and fifth Overlook Terrace questions. N.J.S.A. 2A:170-51.4, N.J.S.A. 2C:33-13.1, and other related

statutes² are all singularly focused on the sale of tobacco to persons under the age of 19 and are silent with respect to the propriety of sales to 19 and 20 year olds. The limited scope of these statutes, silent with respect to the treatment of 19 and 20 years olds, suggests that these laws are not intended to be either exclusive or comprehensive in the field of lawful tobacco sales. See Mack, 103 N.J. at 575 (ruling that State law did not treat the subject of Sunday closings comprehensively or exhaustively because it was limited and selective in contrast to the Code's comprehensive treatment of prohibited street conduct, from which the omission of a specific and particular loitering offense assumed significance in Crawley). See also C.I.C., 266 N.J. Super. at 11. In addition, even in Crawley, where a municipal loitering ordinance was struck down in part because the Code represents a comprehensive and complete system of criminal law, the Court noted that the conduct sought to be regulated through the preempted ordinance may still be the subject of a municipal ordinance "dealing with property offenses, vandalism, pollution and public health." Crawley, 90 N.J. at 251-252.

Moreover, the policies represented by N.J.S.A. 2A:170-51.4, N.J.S.A. 2C:33-13.1, and the other related statutes, would not be contravened by a municipal ordinance prohibiting tobacco sales to 19 and 20 year olds. Certainly, as discussed in the conflict analysis, such an ordinance would not contravene the clear State policy to proscribe tobacco sales to persons younger than 19. Nor is there any clear State policy condoning or favoring tobacco sales to 19 and 20 year olds that such an ordinance might frustrate. To the contrary, there are several legislative findings and declarations of policy in the statutes indicating that tobacco use is a substantial societal problem disfavored by the Legislature. See N.J.S.A. 2A:170-51.5; N.J.S.A. 26:3D-56; N.J.S.A. 52:4D-1. Thus, stricter municipal limits on tobacco use may be viewed as complementary to State policy.

² Other statutes addressing minor access to tobacco include: N.J.S.A. 2A:170-51.1 (makes it a disorderly persons offense for a person older than 19 to purchase a tobacco product for a person who is under 19); N.J.S.A. 2A:170-51.5 (bans the sale or distribution of flavored cigarettes altogether, primarily because they might entice minors to use and become addicted to tobacco); N.J.S.A. 18A:39-31 (prohibits tobacco advertisements on school buses); N.J.S.A. 26:2F-7 (provides grants to fund local enforcement efforts concerning the sale and commercial distribution of tobacco products to persons under the age of 19 years); N.J.S.A. 34:5A-10.2 (prohibits the use of hazardous substances, including tobacco, in public and private schools, under college grade, and child care centers, when children are present); N.J.S.A. 54:40A-4.1 (requires a sign be posted at the point of display of a tobacco product and point of sale indicating that a person who sells a tobacco product to a person under 19 years of age is liable to a penalty of up to \$1,000); N.J.S.A. 54:40A-49 (requires cigarette seller to confirm purchaser's age is 19 to complete non-face-to-face sale of cigarettes).


Lastly, the third Overlook Terrace question is left to be addressed. “A subject in need of statewide uniformity is one in which the needs with respect to those matters do not vary locally in their nature or intensity,” and with regard to which “[m]unicipal action would not be useful, and indeed diverse local decisions would be mischievous and even intolerable.” Mack, 103 N.J. at 577 (citation and internal quotations omitted). This standard was applied in C.I.C., where the court held the sale of cigarettes to minors was “very much a matter of local concern, responses to which could vary locally in both nature and intensity and upon which municipal action need not be mischievous or intolerable.” 266 N.J. Super. at 9 (citation and internal quotations omitted). While C.I.C. only addressed varying municipal regulatory approaches to preventing tobacco sales to minors, it indicates that municipal variation in the restrictiveness of tobacco sales does not present practical problems that rise to the level of intolerability required for preemption.

Conclusion

It is the opinion of Legislative Counsel that a municipal ordinance prohibiting the sale of tobacco, within that municipality, to persons under 21 would not be contrary to any policy clearly evinced by the State’s statutory scheme regarding lawful tobacco sales. Thus, it cannot be confidently said that the Legislature intended to preclude more restrictive municipal regulation in that area. This opinion is bolstered by the constitutional requirement that statutes concerning municipalities be liberally construed in their favor. Accordingly, we believe that a municipal ordinance banning tobacco sales to 19 and 20 year old persons should withstand legal challenge asserting that such ordinance is preempted by State law.

Very truly yours,

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By: 

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JK: