THANK YOU FOR NOT SMOKING . . . INDOORS: THE CONFUSING STATE OF LOCAL GOVERNMENT SMOKING REGULATION IN FLORIDA

John K. Shamsey*

The last two decades have seen significant developments in society's view of smoking, due in large part to the validation of long-standing research on lung cancer, big-tobacco litigation, and new studies regarding the dangers of secondhand smoke.[1] Florida has followed this trend, and along with increased awareness has come legislation, beginning with the Florida Clean Indoor Air Act in 1985 and a subsequent constitutional Amendment in 2003 that created even stricter, broader smoking prohibitions in most indoor public places. Since its inception, the Florida Clean Indoor Air Act has contained a preemption provision stating that the "regulation of smoking" in the State of Florida is expressly preempted by the State.[2] As of 2011, Florida was one of only twelve states to have such a preemption clause—between 2002 and 2011, seven states repealed such preemption provisions—and it is this clause that has caused confusion and consternation

 Attorney with Fournier, Connolly, Warren & Shamsey, P.A., and currently serves as Assistant City Attorney for the City of Sarasota, Florida. J.D., Florida State University College of Law; M.A., University of Alabama-Birmingham; B.S., Samford University.

1. *See e.g.* U.S. Dep't of Health & Human Servs., *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*, http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf (2006).

2. Fla. Stat. § 386.209 (2011). In its original form, Section 386.209 reads, "This act expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject." Fla. Stat. § 386.209 (1985); *see* Ams. for Nonsmokers' Rights, *Preemption of Smokefree Air Laws in the U.S.*, http://www.protectlocalcontrol.org/docs/USpreemptionFactsheet.pdf (accessed May 5, 2014) (stating that anti-tobacco organizations contend that Florida was the first state to have a statewide smoking regulation act that contained a preemption clause). This preemption clause was inserted at the behest of the tobacco lobby, as Florida was a "test case" for the insertion of the clause. It was a goal of Big Tobacco that all fifty states would eventually have such preemption clauses. *Id.*

among many of Florida's local governmental entities.[3] Particularly, the regulation of outdoor smoking has been the subject of some debate in recent years.[4] This Article explores the current state of outdoor smoking regulation in Florida by examining the Florida Clean Indoor Air Act, attorney general opinions about the Act, and the limited caselaw that interprets the Act, including a late 2012 case in Sarasota, Florida. This Article contends that the current state of outdoor smoking regulation is at best, a confusing state of affairs for local governments, and at worst, an unintentionally preempted subject matter by the State. In either case, the Florida Legislature should clarify and remedy the Florida Clean Indoor Air Act so there is a clear, equitable resolution to the problematic state of outdoor smoking regulation in Florida.

I. THE MUNICIPAL HOME RULE POWERS ACT AND SECTION 22-6(H) OF THE CODE OF THE CITY OF SARASOTA

The State of Florida created all municipalities.[5] Prior to the 1968 Florida Constitution, municipalities in Florida had only those powers specifically delegated to them by the State. If no general or special law existed that specifically delegated a certain power to municipalities, then municipalities could not exercise that power. However, Article VIII, Section 2, of the 1968 constitution and the Municipal Home Rule Powers Act, which was adopted in 1973 and codified in Chapter 166 of the Florida Statutes, dramatically changed municipal authority.[6] Florida Statutes Section 166.021(1), in conjunction with Article VIII, Section 2, of the constitution, provides that a municipality may exercise any power for municipal purposes, except when expressly prohibited by law.[7] Therefore, since 1973, analysis of municipal

3. *Id.*

4. *See* HuffPost Miami, *Public Smoking Ban in Florida Introduced by New Senate Bill*, http://www.huffingtonpost.com/2013/02/22/florida-smoking-ban_n_2741400.html (updated Feb. 22, 2013, 2:32 p.m. EST) (exemplifying the debate concerning smoking regulations in Florida).

5. Legis. Comm. on Intergovernmental Regs., *Overview of Municipal Incorporations in Florida*, http://celdf.org/downloads/Florida%20-%20Overview%20of%20Municipal%20Corporations%20in%20Florida.pdf (Feb. 2001).

6. Fla. Const. art. VIII, § 2.

7. Fla. Stat. § 166.021(1) (2011).

authority requires a determination of whether the power to be exercised has been expressly prohibited by the State, rather than determining whether there has been a specific grant of power.[8] If no specific prohibition is found, the municipality may exercise the power for a municipal purpose.

This analysis of municipal authority is supported by the Florida Supreme Court's opinion in *City of Boca Raton v. State*.[9] In that case, the City of Boca Raton chose to create a special-assessment district using a different method than was specifically outlined in Florida Statutes Chapter 170.[10] The trial court held that the Municipal Home Rule Powers Act did not authorize a city to choose an alternative special-assessment method.[11] Rather, the trial court believed that Chapter 170 was the enabling legislation and was the only available procedure.[12] The Florida Supreme Court ultimately rejected this position by relying upon the home rule powers theory and holding that "[l]egislative statutes are relevant only to determine *limitations* of authority."[13]

It was under this paradigm that the City of Sarasota enacted its prohibition on smoking in public parks in Sarasota City Code Section 22-6(h).[14] The Municipal Home Rule Powers Act establishes that a municipality has the inherent authority to regulate certain conduct in its parks, and because the Florida Clean Indoor Air Act only regulates and pertains to *indoor* smoking, the

8. *Id.*

9. 595 So. 2d 25 (Fla. 1992).

10. *Id.* at 28. A special assessment is similar to a tax charged by a municipality that confers a specific benefit upon the land burdened by the assessment. *Black's Law Dictionary* 133 (Bryan A. Garner ed., 9th ed., West 2009).

11. *City of Boca Raton*, 595 So. 2d at 26.

12. *Id.* at 26–27.

13. *Id.* at 28 (emphasis added). The home rule powers theory, in essence, stands for the notion that, since 1973, a Florida municipality may exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law. Fla. Const. art. VIII, § 2.

14. Sarasota Code Ordin. (Fla.) § 22-6(h) (2011). The heading for Section 22-6 reads, "Prohibited activities within all parks." Subsection (h) reads:

> No person shall smoke cigarettes, cigars or pipes, or use any other tobacco products within a park or on the public sidewalk right-of-way adjacent to a park, unless such activity occurs in an area designated for smoking or tobacco use by posted signage. The city commission shall establish and designate any such area within a park or on adjacent right-of-way where smoking or the use of tobacco products is allowed by resolution. This prohibition shall not apply to any facility located within a park that is operated by a duly authorized private entity.

Id.

limitation on municipalities created by the preemption language in Florida Statutes Section 386.209 likewise only pertains to *indoor* smoking regulations.

In the fall of 2012, the Sarasota Police Department cited an individual with a violation of Sarasota City Code Section 22-6(h) for smoking tobacco in a downtown city park.[15] An information was filed in Sarasota County Court because the enabling ordinance for Section 22-6(h) provided that the cited violation was in a class of city code violations that are prosecuted in county court with maximum penalties of up to sixty days in jail, a $500 fine, or both.[16] The defendant moved to dismiss for lack of jurisdiction, arguing that the court lacked jurisdiction over the matter because Sarasota City Code Section 22-6(h) was preempted by State law under Section 386.209 of the Florida Clean Indoor Air Act.[17] Soon after, counsel for the defendant took on representation of other clients who were cited for Section 22-6(h) violations and filed additional motions to dismiss, which were identical to the original motion. In the interest of efficiency and consolidation of judicial resources, the City and the defendants agreed to hold a "master" hearing, which would decide the similar issue raised in the motions to dismiss, and the holding would apply uniformly to the similar cases. The hearing was held on November 30, 2012, in which the trial court found for the defendants in holding that Section 386.209 of the Florida Clean Indoor Air Act preempted the City's Section 22-6(h). The court reasoned that Section 386.209 was intended to preempt all smoking regulations anywhere in the State of Florida, not just indoor smoking regulations.[18] The City did not appeal the ruling,[19] all of the relevant cases were dismissed, and the City then ceased enforcing Section 22-6(h).

15. Or. Granting Mot. to Dismiss, *City of Sarasota v. Bonilla*, https://www.documentcloud.org/documents/537782-circuit-court-ruling-sarasota-smoking-ordinance.html (Sarasota Fla. Co. Ct. Dec. 10, 2012) (No. 2012 MO 012197 NC).

16. *Id.*; *see* Sarasota Code Ordin. (Fla.) § 1-11 (1971) (explaining the penalties for violations of the Code).

17. Or. Granting Mot. to Dismiss, *City of Sarasota v. Bonilla*, *supra* n. 15.

18. *Id.*

19. The City of Sarasota had decided prior to the hearing that it would not appeal an unfavorable decision by the county court due to economic and other factors at the time.

II. ATTORNEY GENERAL OPINIONS, KURTZ v. CITY OF NORTH MIAMI, *AND FLORIDA STATUTES SECTION 386.209*

Although the City of Sarasota lost its case regarding smoking in city parks, the arguments put forth by the City likely encompass similar viewpoints held by other local governmental bodies throughout the State.[20] This Article seeks to outline such positions and analyze the misgivings by local governments regarding the current status and scope of the Florida Clean Indoor Air Act, specifically Section 386.209.

A. Attorney General Opinions Generally and the 1985 Florida Clean Indoor Air Act

Those advocating for total state preemption of smoking regulations argue that several attorney general opinions (AGOs) definitively establish that the regulation of outdoor smoking in government parks, such as Sarasota City Code Section 22-6(h), is expressly preempted by the State under the Florida Clean Indoor Air Act.[21] Notwithstanding that this Article will later argue that the AGOs on this issue may have simply interpreted the law incorrectly, it must be noted that Florida law has also clearly established that AGOs are persuasive, not binding. In *State v. Family Bank of Hallandale*,[22] the Florida Supreme Court found that AGOs were highly persuasive and required careful consideration but were not binding on a court.[23] In *Family Bank*, the Court stated that "[t]he official opinions of the Attorney General, the chief law officer of the state, are guides for state executive

20. *See* Sun Sentinel, *On Smoking Bans, State Should Butt Out*, http://articles.sun-sentinel.com/2013-12-09/news/fl-editorial-smoking-in-parks-dv-20131209_1_smoking-bans-second-hand-smoke-parks-and-beaches (posted Dec. 9, 2013) (explaining different viewpoints on smoking ban issues throughout Florida); *see also* Skyler Swisher, *Volusia, Flagler Pushing for Beach Smoking Ban*, http://tbo.com/news/florida/volusia-flagler-push-for-beach-smoking-ban-20130825/ (posted Aug. 25, 2013) (illustrating the growing support of proposed smoking bans on local beaches).

21. Fla. Att'y Gen. Op. 2011-15, 2011 WL 3035101 at *1 (July 21, 2011); Fla. Att'y Gen. Op. 2010-53, 2010 WL 5433868 at *1 (Dec. 29, 2010); Fla. Att'y Gen. Op. 2005-63, 2005 WL 3121424 at *1 (Nov. 21, 2005).

22. 623 So. 2d 474 (Fla. 1993).

23. *Id.* at 478.

and administrative officers in performing their official duties *until superseded by judicial decision.*"[24]

While AGOs are certainly persuasive and provide guidance, Florida law is clear that AGOs are not a substitute for already established caselaw and will lose persuasiveness when a judicial decision is made in an area of law where there is no court precedent to rely on. Thus, the argument for outdoor smoking preemption under Section 386.209 of the Florida Clean Indoor Air Act should not be based solely on AGOs, and courts should not be required to follow the AGOs if they disagree with the AGOs' conclusions.

With due respect to the Florida Attorney General's office, this Author contends that the Florida Clean Indoor Air Act was never intended to preempt the regulation of *outdoor* smoking by local governments. Under Florida law, preemption can be either expressed or implied.[25] The Attorney General's contention is that municipal regulation of outdoor smoking within a city's limits is *expressly* preempted by Florida Statutes Section 386.209.[26] However, under the doctrine of express preemption, there must be a clear intent by the Florida Legislature to take a topic or a field that would normally be regulated by local governments and reserve that topic for exclusive regulation by the Legislature.[27] The Second District Court of Appeal has explained that "[t]o find a subject matter expressly preempted [by] the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred."[28] This Author contends that if one looks at the Florida Clean Indoor Air Act as a whole

24. *Id.* (emphasis added).

25. Although the doctrine of implied preemption is generally not raised in this context, this Author contends that Section 386.209 does not preempt the regulation of outdoor smoking by implication either. Not only is implied preemption extremely rare, but also it only occurs if the "legislative scheme is so pervasive that it occupies the entire field." *Santa Rosa Co. v. Gulf Power Co.*, 635 So. 2d 96, 101 (Fla. 1st Dist. App. 1994); *see also Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st Dist. App. 1996) (stating that "[i]mplied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature").

26. Fla. Att'y Gen. Op. 2010-53, *supra* n. 21.

27. *Phantom of Clearwater, Inc. v. Pinellas Co.*, 894 So. 2d 1011, 1018 (Fla. 2d Dist. App. 2005).

28. *Hillsborough Co. v. Fla. Rest. Ass'n, Inc.*, 603 So. 2d 587, 590 (Fla. 2d Dist. App. 1992).

and reads Section 386.209 in context, it is clear that the legislation clearly preempts something, but that something is *indoor*—not outdoor—smoking.

The Florida Clean Indoor Air Act was adopted in 1985 by the Florida Legislature.[29] As can be seen by reviewing the original 1985 Act, it was placed in Chapter 386, titled "Particular Conditions Affecting Public Health," and labeled "Part II—*Indoor* Air: Tobacco Smoke."[30] Section 386.202 of the 1985 version states that "[t]he purpose of this act is 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 . . . ."[31] Section 386.203 of the 1985 version defines "public place" as "the following *enclosed*, *indoor* areas used by the general public" and goes on to list numerous indoor facilities used by the general public within a community.[32] The prohibition put forth in the 1985 version states in part that "[n]o person may smoke in a public place or at a public meeting except in designated smoking areas."[33] In light of the foregoing, it certainly seems reasonable to conclude that Section 386.209 of the 1985 version, which states that "[t]his act expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject,"[34] was meant to simply preempt the regulation of *indoor* smoking in the State of Florida. Because Section 386.209 uses only the word "smoking" and not "indoor and outdoor smoking" or "all smoking," the context in which the word "smoking" is used must be examined. The part of Chapter 386 that Section 386.209 falls under is called "*Indoor* Air: Tobacco Smoke," and the Act creating the prohibition is called the "Florida Clean *Indoor* Air Act."[35] The entire regulatory scheme of Sections 386.201 through 386.2125 pertains to indoor smoking, as do the definitions of what and where the Act is meant to regulate.[36] Thus, it is a rational conclusion that the "smoking" referred to in Section 386.209 was

29. Fla. Stat. §§ 386.201–2125 (1985). In the Act's original 1985 version, Section 386.201 states that "[t]his part may be cited by the popular name the 'Florida Clean Indoor Air Act.'" *Id.* at § 386.201.

30. *Id.* at ch. 386 (emphasis added).

31. *Id.* at § 386.202.

32. *Id.* at § 386.203 (emphasis added).

33. *Id.* at § 386.204.

34. *Id.* at § 386.209.

35. Fla. Stat. tit. 29, ch. 386, pt. II (2011) (emphasis added).

36. *Id.*

indoor smoking—not indoor and outdoor smoking or all smoking. When read in this context, it is certainly a logical conclusion that when created in 1985, Section 386.209 was meant for the State to preempt only the regulation of indoor smoking.[37]

B. *Kurtz v. City of North Miami*

The only court case to specifically address the issue of preemption under Section 386.209 of the Florida Clean Indoor Air Act is *Kurtz v. City of North Miami*.[38] In *Kurtz*, the City of North Miami enacted an administrative regulation that required all job applicants to sign an affidavit stating that they had not used tobacco or tobacco products for at least one year immediately preceding the application.[39] In beginning its discussion of whether the City could lawfully require its new employees to refrain from partaking in lawful conduct, that is, smoking, under a right of privacy analysis, the Third District Court of Appeal noted that the Florida Clean Indoor Air Act did not preempt the City's regulation because the Act "preempts all local ordinances dealing with the subject of restriction of *indoor* smoking."[40] Thus, the only comment by a Florida appellate court on the preemption issue in Section 386.209 has made clear that any preemption created by the Florida Clean Indoor Air Act pertains only to the regulation of indoor smoking.[41]

37. A reading of the "smoking" reference in Section 386.209 as preempting only the regulation of indoor smoking is buttressed by the *noscitur a sociis* canon of statutory interpretation, meaning "a word is known by the company it keeps." *See Stratton v. Sarasota Co.*, 983 So. 2d 51, 56 (Fla. 2d Dist. App. 2008) (citing *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So. 2d 201, 205 (Fla. 2003)). When evaluating the statute using *noscitur a sociis*, one "examines the other words used within a string of concepts to derive the legislature's overall intent." *Id.*

38. 625 So. 2d 899 (Fla. 3d Dist. App. 1993), *rev'd*, *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995).

39. *Id.* at 900.

40. *Id.* at 900 n. 1 (emphasis added).

41. Notably, the Florida Supreme Court reversed the Third District's finding that the Florida Constitution was violated if a government regulation regarding smoking intruded into the privacy rights of a citizen. *Kurtz*, 653 So. 2d at 1028. The Florida Supreme Court also found there is no inherent "right to smoke" under the United States Constitution. *Id.*

C. The Current Version of the Florida Clean Indoor Air Act and Section 386.209 and Recent Attorney General Opinions

Sections 386.201 through 386.2125 of the Florida Clean Indoor Air Act, as they currently read, contain minor differences from the Act's original 1985 version due to various amendments throughout the years.[42] The main objective of the Act's current version is still to regulate indoor smoking, as is evidenced by the current Section 386.202, which is labeled "Legislative Intent." This Section explains that the Act's purpose is to protect the public from secondhand smoke and to implement Article X, Section 20, of the Florida Constitution.[43] Additionally, Section 386.204, labeled "Prohibition," states that "[a] person may not smoke in an enclosed *indoor* workplace, except as otherwise provided in [Section] 386.2045."[44] The differences in the current version of the Florida Clean Indoor Air Act are the addition of Section 386.212 in 1996 and one substantive amendment in 2011 to Section 386.209. These differences arguably muddy the indoor-smoking-versus-all-smoking preemption issue and are cited by the most recent AGOs with regard to why Section 386.209 should be construed to also preempt the regulation of outdoor smoking.[45]

Florida Statutes Section 386.212 makes it unlawful for a person younger than the age of eighteen to use tobacco products within one thousand feet of school property.[46] AGOs 2005-63 and 2010-53 both cite the existence of Section 386.212 as evidence that the preemption language in Section 386.209 was intended to also encompass outdoor smoking, because the prohibition in Section 386.212 would obviously regulate some outdoor smoking near schools.[47] However, a closer look at Section 386.212 shows that this analysis is quite likely flawed. In effect, Section 386.212 is a civil citation and penalty provision that appears to give law enforcement an additional way to curb youth smoking, one that frankly seems out of place in the Florida Clean Indoor Air Act—

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42. *Infra* pt. III.

43. Fla. Stat. § 386.202. Article X, Section 20, of the Florida Constitution begins by stating that "[a]s a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke, tobacco smoking is prohibited in enclosed indoor workplaces."

44. Fla. Stat. § 386.204 (emphasis added).

45. *Id.* at §§ 386.209, 212.

46. *Id.* at § 212.

47. Fla. Att'y Gen. Op. 2010-53, *supra* n. 21; Fla. Att'y Gen. Op. 2005-63, *supra* n. 21.

an Act that regulates workplace-related and indoor smoking. In addition, a closer look at the history of youth-smoking legislation by the Florida Legislature buttresses this rationale, as the adoption of Section 386.212 *predates a subsequent all-encompassing ban* on the possession of any tobacco by minors; such a ban was enacted in 1997 and codified in Florida Statutes Section 569.11(1).[48] Thus, it seems reasonable to contend that the subsequent adoption of Section 569.11(1) might not only explain some of the intent behind Section 386.212—that is, to create a measure to curtail youth smoking—but also, and more importantly, to make Section 386.212 an obsolete statutory provision.

The 2011 amendment to Section 386.209 purports to make an exception to whatever is preempted by the unspecified "smoking" language in the original sentence in the original version of Section 386.209 by allowing school boards to further regulate smoking on their property.[49] AGO 2011-15 cites this amendment as evidence as to why Section 386.209 cannot be read to only preempt the regulation of indoor smoking.[50] In the Attorney General's opinion, this amendment implies that school districts are only now allowed to regulate outdoor smoking.[51] In other words, if school districts had already been allowed to regulate outdoor smoking, this amendment was pointless. On first reading, this argument may seem fairly persuasive; however, with further review, the Author contends that this argument is somewhat circular, as it actually *must* start with the assumption that Section 386.209 does in fact preempt outdoor smoking.

First, the term "outdoor smoking" is not actually used—and does not appear—in the school district amendment language. The language simply states that the school districts may "further restrict smoking" on school district property.[52] The Attorney General assumed the phrase "further restrict smoking" must have referred to outdoor smoking regulations because she read the first part of Section 386.209 to preempt, and therefore not

48. Fla. Stat. § 569.11(1) (1997) (making it unlawful for a minor to have or control any tobacco products).

49. *Id.* at § 386.209 (2011) (stating that "school districts may further restrict smoking by persons on school district property").

50. Fla. Att'y Gen. Op. 2011-15, *supra* n. 21.

51. *Id.*

52. Fla. Stat. § 386.209.

allow, the regulation of outdoor smoking by local governments.[53] However, if one starts with the understanding that the pre-amended version of Section 386.209, and the Florida Clean Indoor Air Act as a whole, *does not* preempt outdoor smoking regulations by local governments, then a reading of the amendment as the Attorney General contends would seem pointless because local governments are already allowed to regulate outdoor smoking.

What then did the amendment intend to allow school districts to do that they could not do previously? When viewed under this alternate paradigm, a rational interpretation is that the vaguely worded phrase "further restrict smoking" could simply refer to a plethora of additional employment-related and indoor smoking regulations by school districts on their property—additional regulations that could arguably otherwise be pre-empted by the detailed language in the Florida Clean Indoor Air Act.

Analysis of circular argument possibilities aside, the simple truth of the matter is that if the Florida Legislature intended to clear up a vaguely worded preemption provision with its school district property amendment, it could have simply added the phrase "indoor *and outdoor* smoking" or "*all* smoking" to Section 386.209 along with the school district amendment language. In a broader sense, why would the Florida Legislature not, in the twenty-seven years and numerous legislative amendments since the Act was enacted, simply have amended the title of the Act, and all references within, from "indoor smoking" to "indoor and outdoor" or "all smoking"? In the alternative, the Florida Legislature could have simply stated in Section 386.202, the "purpose" Section, or in Section 386.204, the "prohibition" Section, that the Act's purpose is to provide "all regulation and prohibition regarding all smoking within the State of Florida" or that "any and all local regulations regarding prohibitions on smoking are null and void." This Author contends that the rather simple answer to this question is that the Florida Legislature never intended the Florida Clean Indoor Air Act to preempt the regulation of outdoor smoking by local governments. Granted, subsequent legislatures and attorneys general may have not been clear on the matter (and may have certainly also muddied the

53. Fla. Att'y Gen. Op. 2011-15, *supra* n. 21.

issue), but retroactive backdoor amendments and advisory opinions will not change the fact that the preemption contained in the Florida Clean Indoor Air Act is limited to the employment-related and indoor smoking types of regulation contained therein.

III. IS THERE A DISTINCTION IF LOCAL GOVERNMENTS ONLY PROHIBIT SMOKING IN GOVERNMENT-OWNED AND -OPERATED PROPERTY?

Even if Section 386.209 of the Florida Clean Indoor Air Act does generally preempt outdoor smoking regulations by local governments, is there a distinction between a blanket regulation of all outdoor smoking within a local government's jurisdiction and a smoking regulation that restricts the use of tobacco products only on local government-owned and -operated property? This Author contends that this more limited restriction on smoking and tobacco use on local government-owned and -operated parks, beaches, and government facilities is certainly not the type of legislation meant to be preempted by the Florida Clean Indoor Air Act. The restrictions in the Florida Clean Indoor Air Act apply statewide and, with limited exceptions, to nearly every indoor facility used by the general population consisting of government and private property.[54] The Florida Clean Indoor Air Act is an extremely far-reaching public health regulation on indoor behavior throughout the State.

In contrast, most local governments, like the City of Sarasota, that have regulations pertaining to some outdoor smoking have not totally banned smoking outdoors throughout the entire jurisdiction or on private property. A person can walk on any public sidewalk, stand in medians, or sit anywhere outside on private property and smoke or use tobacco products without any local government say in the matter. Additionally, and more importantly, much of the rationale behind local government desire for certain outdoor smoking prohibitions is based on environmental, health, and cleanliness reasons.[55] This relates to the rationale espoused in an appellate court case, *Hillsborough County v. Florida Restaurant Association, Inc.*, in which the State was trying to prevent Hillsborough County from requiring estab-

54. Fla. Stat. §§ 386.201–2125.

55. Sarasota Co. Code Ordin. at § 11-4980.

lishments to post alcohol consumption warning signs under a statute section providing that the State was the sole regulator and inspector of food-service establishments.[56] The Second District Court of Appeal found that the rationales for each governmental entity were different—for example, food safety uniformity versus public health and behavior concerns—and that such differences would require the State to more specifically preempt the specific and somewhat unrelated action the local government was taking.[57]

The outdoor smoking situation discussed herein can be deemed somewhat analogous. The Florida Clean Indoor Air Act is a far-reaching public health regulation creating uniform smoking rules for indoor workplaces and most indoor public places. Even assuming that the public health provisions of the Florida Clean Indoor Air Act were meant to generally preempt wide-reaching local government regulations on outdoor smoking, the provisions certainly could not have been meant to prevent a local government—mainly concerned with environmental, health, and litter concerns—from enacting rules regarding smoking and tobacco use within local government-owned and -operated properties.

It is a fair argument to contend that certain limitations on outdoor smoking by local governments are simply reasonable property restrictions that any private property owner would be free to institute on his or her private property. Is it good public policy for the Florida Legislature to not allow local governments the same rights to regulate and control their property for valid reasons as a private property owner would? Even if a government is generally held to a higher standard than private parties, in regard to smoking it is important to remember that there is no inherent right to smoke, and governmental regulation of smoking that intrudes into the privacy rights of citizens is not a violation of the Florida Constitution.[58]

56. 603 So. 2d 587, 590 (Fla. 2d Dist. App. 1992).

57. *Id.*

58. *Kurtz*, 653 So. 2d at 1028 (finding that a city job applicant did not have a legitimate expectation of privacy regarding his or her tobacco use).

IV. CONCLUSION

The current state of outdoor smoking regulation in the State of Florida is confusing and of concern for local governments around the State. Although AGOs have advised that the Florida Clean Indoor Air Act preempts local government regulation of outdoor smoking in addition to indoor smoking, Florida law states that AGOs provide mere guidance and are not precedent-setting for courts. There has not been any determinative court finding on the matter, and the only published court case that discusses the smoking preemption issue was decided before the two relevant amendments to the Act—Section 386.212 and the school district amendment to Section 386.209—were enacted.[59] Although there are many good arguments as to why State preemption of local government regulation of smoking is not good public policy,[60] at the very least the Florida Legislature should amend the Florida Clean Indoor Air Act to clarify its past and present intentions regarding the power of local governments to regulate certain outdoor smoking within their jurisdictions.

59. *Kurtz*, 625 So. 2d at 899.
60. Ams. for Nonsmokers' Rights, *supra* n. 2.