

THOMAS J. MILLER
ATTORNEY GENERAL



ADDRESS REPLY TO:
Licensing & Administrative Law
1305 E. Walnut Street
Des Moines, IA 50319
Telephone: 515/ 515-281-3441
Fax: 515/281-7551
hadams@ag.state.ia.us

HEATHER L. ADAMS
ASSISTANT ATTORNEY GENERAL

Iowa Department of Justice

TO: Jerilyn Oshel, Division Director
FROM: Heather Adams, Assistant Attorney General *HAA*
DATE: February 16, 2015
RE: Cigarettes, Tobacco Products, Alternative Nicotine Products, and Local Regulation

You have asked whether local governments can adopt more stringent standards regarding cigarettes, tobacco products and alternative nicotine products than those established in Iowa Code Chapter 453A, as recently amended by House File 2109. You have specifically asked whether a city or county could adopt an ordinance which:

1. Raises the age of persons able to purchase tobacco above 18
2. Adds penalties if a merchant sells tobacco to a minor or violates any other law related to tobacco sales
3. Revokes a license if a merchant sells tobacco to a minor or violates any other law related to tobacco sales
4. Prohibits redemption of tobacco discounts and coupons
5. Establishes minimum package size for little cigars and cigars
6. Establishes minimum price for cigarettes and little cigars
7. Restricts tobacco and e-cigarette retailers within a certain square footage from schools
8. Restricts tobacco retailer permits per square mile

It is my opinion that the adoption of a local ordinance in the subject areas one through six above would likely be preempted by state law, and that adoption of a local ordinance in the subject areas of seven and eight would likely not be preempted.

Background

Iowa Code chapter 453A establishes a comprehensive framework for regulating the sale of cigarettes¹ and tobacco products.² Chapter 453A establishes an age requirement for

¹ "Cigarette" means any roll for smoking made wholly or in part of tobacco, or any substitute for tobacco, regardless of size or shape and irrespective of tobacco or any substitute being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material. Iowa Code § 453A.1(3).

² "Tobacco products" mean cigars; little cigars as defined in section 453A.42(5); cheroots; stogies; periques; granulated; plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff, snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobaccos; shorts; or refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be

the use, sale, purchase, and possession of cigarettes and tobacco products³ and establishes penalties for the violation of these provisions.⁴ Chapter 453A further governs taxation of cigarettes and tobacco products;⁵ establishes a permitting scheme for distributors, wholesalers, retailers, and manufacturers;⁶ and establishes penalties for violations of the permitting requirements.⁷ Finally, the statute restricts the sale of cigarettes and tobacco products made through vending machines;⁸ contains restrictions on how cigarettes and tobacco products are to be packaged;⁹ and prohibits tobacco promotions.¹⁰

House File 2109, effective July 1, 2014, amends chapter 453A by defining and regulating two products that were not previously covered under Iowa law: alternative tobacco products¹¹ and vapor products.¹² The bill:

- (1) establishes an age requirement for the use and possession of these products;
- (2) requires distributors, wholesalers, vendors, and retailers to obtain a permit to sell or distribute these products;
- (3) limits the product placement of these devices; and
- (4) restricts the places where the products can be given away.

Local Regulation & Preemption

The question of whether a county or city may adopt a regulation which is more stringent than Iowa Code chapter 453A requires an analysis of the local government's legal authority to act and application of the legal doctrine of preemption. A county or city may not establish standards or requirements which are "lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more

suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but does not mean cigarettes. Iowa Code § 453A.1(26).

³ Iowa Code § 453A.2

⁴ Iowa Code § 453A.3

⁵ Iowa Code §§ 453A.6 – 453A.12, 453A.43

⁶ Iowa Code §§ 453A.13 – 453A.21

⁷ Iowa Code §§ 453A.22, 453A.31

⁸ Iowa Code § 453A.36

⁹ Iowa Code § 453A.36

¹⁰ Iowa Code § 453A.39

¹¹ "Alternative tobacco product" means a product, not consisting of or containing tobacco, that provides for the ingestion into the body of nicotine, whether by chewing, absorbing, dissolving, inhaling, snorting, or sniffing, or by any other means. "Alternative nicotine product" does not include cigarettes, tobacco products, or vapor products, or a product that is regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act. HF 2109, § 2.

¹² "Vapor product" means any noncombustible product, which may or may not contain nicotine, that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from a solution or other substance. "Vapor product" includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device, and any cartridge or other container of a solution or other substance, which may or may not contain nicotine, that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. "Vapor product" does not include a product regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act. HF 2109, § 2.

stringent than those imposed by state law, unless a state law provides otherwise.” Iowa Code §§ 331.301(6), 364.3(3). A city or county may not pass a local regulation which is irreconcilable with state law. Iowa Code §§ 331.301(4), 364.2(3); *see also* Iowa Const., art.III, § 38A.

The Iowa Supreme Court will attempt to harmonize state and local laws, particularly where a law addresses the health and safety of citizens. *See Kent v. Polk County Bd. of Supervisors*, 391 N.W.2d 220, 223 (Iowa 1986). However, the Court has recognized the authority of the general assembly to preempt local regulation, and has found that such preemption may be either express or implied. *Goodell v. Humboldt County*, 575 N.W.2d 486, 492 – 93 (Iowa 1998).

Express preemption.

“Express preemption occurs where the legislature has explicitly prohibited local action in a given area.” *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014). Iowa law expressly preempts local regulation in the areas covered by chapter 453A, including age restrictions; permitting; taxing;¹³ and product placement and packaging of cigarettes, tobacco products, and e-cigarettes. Specifically, Iowa Code chapter 453A contains a provision on uniform application of the chapter, stating:

Uniform application. Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter. Iowa Code § 453A.56.

The Iowa Supreme Court has held that this language explicitly prohibits a local jurisdiction from adopting more stringent standards than those which were established in the state law. *James Enterprises v. City of Ames*, 661 N.W.2d 150, 153-54 (Iowa 2003). Thus, a local jurisdiction would likely be preempted from adopting regulations governing cigarettes, tobacco products, and e-cigarettes in those areas expressly regulated by chapter 453A, including age restrictions, permitting, taxation, and packaging.

However, Iowa Code chapter 453A does not include any language regarding the location or density of tobacco retailers. Because Iowa Code chapter 453A does not explicitly regulate in these areas, state law does not expressly preempt local legislation on this subject. *See Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008). Additionally, chapter 453A grants authority to cities and counties to issue retailer permits to dealers within their jurisdiction and to regulate in this

¹³ Additionally, with respect to taxation, home rule provisions in the Iowa Constitution restrict cities and counties from levying a tax unless expressly authorized by the legislature to do so. Constitution of the State of Iowa, Art. III, §§ 38A and 39A.

area. Iowa Code § 453A.13; *see also Ford Hopkins v. Iowa City*, 248 N.W 668 (Iowa 1933) (city authorized to limit the number of permits issued to tobacco retailers).

Implied preemption.

Implied preemption may be established one of two ways: field preemption, which occurs when the legislature has enacted a comprehensive regulatory framework; or conflict preemption, which occurs when a local ordinance conflicts with a state statute. *Madden*, 848 N.W.2d at 49. Field preemption will be found when the legislature has covered a subject matter so comprehensively that it demonstrates a legislative intention that the field is preempted by state law, and conflict preemption exists when a local ordinance prohibits an activity permitted by statute or permits an activity prohibited by statute. *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998).

With respect to field preemption, the “mere fact that the general assembly has legislated extensively in a given area does not itself establish legislative intent to occupy the field,” and the Supreme Court has rarely found a statute to occupy the field so as to provide localities with the flexibility needed to address local issues. 2000 WL 33258478 at * 3; *see also Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) (local ordinance establishing traffic enforcement system was not impliedly preempted by state statutes governing speeding and traffic signals); *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 860 – 61 (Iowa 2002); 2008 WL 6690123 (Iowa A.G.) (state law does not preempt cities from imposing stricter residency requirements for sex offenders than those imposed in chapter 692A).

There is not an express indication in chapter 453A that the legislature intended to occupy the field with respect to all facets of tobacco and e-cigarette sales, distribution, marketing, and use. As noted above, chapter 453A does contain an express indication that the legislature intended to prohibit local regulation which would be inconsistent with or in conflict with the provisions addressed by the chapter – namely age restrictions, permitting, taxation, product placement, and packaging. However, chapter 453A contains no provisions or restrictions on location or density of tobacco retailers. Topic areas which are unaddressed by the chapter are likely not preempted under field preemption.

With respect to conflict preemption, “the issue must be whether the local ordinance prohibits an act expressly *sanctioned* by state law.” 2000 WL 33258478 at * 3 (emphasis in original). Iowa Code chapter 453A does not expressly sanction the sale of tobacco products near schools or at a certain density. *Id.*; *see also Patty Sue, Inc. v. City of Springfield*, 2012 WL 2317766 (Mo. App. S.D.). Hence, a local ordinance which restricts retailer location or density could exist harmoniously with Iowa Code chapter 453A, and conflict preemption would likely not occur. *Davenport v. Seymour*, 755 N.W.2d 533, 538

– 39 (Iowa 2008). However, a local ordinance which contained age restrictions or permitting requirements that differed from those contained in chapter 453A would likely be found to be in conflict with state law. *Id.*

Summary

Iowa Code chapter 453A, as recently amended, contains age restrictions governing the use of cigarettes, tobacco products, and electronic cigarettes, and further governs permitting, taxation, product placement, and packaging related to these products. This law also contains a legislative directive that these provisions be applied uniformly throughout the state and that such provisions supersede any local regulation which is inconsistent with or conflicts with such provisions. Local governments should therefore proceed with caution in regulating these aspects of cigarettes, tobacco products, and electronic cigarettes and should consult with their legal counsel to determine whether such regulations would in fact be preempted by state law.

Iowa law does not currently address location or density of retailer permits. A local governmental entity is therefore likely not preempted from enacting regulations containing such restrictions. Local governments should consult with their legal counsel prior to adopting regulations restricting retailer permitting in these areas to ensure that preemption issues are fully identified and addressed.

Please note that this memorandum is not a formal opinion of the Attorney General.