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Opinion No. 07-152

Local Government Regulation of Smoking in Parks

QUESTION

Does Tenn. Code Ann. § 39-17-1551 prevent a city, county, or county having a metropolitan form of government from enacting an ordinance that would prohibit smoking in parks owned or leased by such city, county, or county having a metropolitan form of government?

OPINION

Yes.

ANALYSIS

In 1994, the General Assembly enacted the "Prevention of Youth Access to Tobacco Act," codified at Tenn. Code Ann. §§ 39-17-1501, *et seq*. This Act, in pertinent part, provides:

> The general assembly intends by this part and other provisions of Tennessee Code Annotated[1] to occupy and preempt the entire field of legislation concerning the regulation of tobacco products. Any law or regulation of tobacco products enacted or promulgated after March 15, 1994, by any agency or political subdivision of the state or any agency thereof is void; provided, that cities, counties and counties having a metropolitan form of government may regulate the use of tobacco products in buildings owned or leased by the political subdivisions; and provided further, that airport authorities created pursuant to the provisions of title 42; utility districts created pursuant to the provisions of title 7; and special school districts may regulate the use of tobacco products in buildings owned or leased by the entities. Notwithstanding any other provision of the law to the contrary, individual owners or operators of retail establishments located within an enclosed shopping mall shall retain the right to determine the policy on the use of tobacco products within the person's establishment.

Tenn. Code Ann. § 39-17-1551.

[1] *See, e.g.*, "Children's Act for Clean Indoor Air," Tenn. Code Ann. §§ 39-17-1601, *et seq*.; "Non-Smoker Protection Act," Tenn. Code Ann. §§ 39-17-1801, *et seq*.

In the first sentence of Tenn. Code Ann. § 39-17-1551, the General Assembly clearly announces its intention to occupy and preempt the entire field of legislation concerning the regulation of tobacco products. Consistent with this declaration, Tenn. Code Ann. § 39-17-1551 next states that any law or regulation of tobacco products enacted or promulgated after March 15, 1994, by any agency or political subdivision of the state or any agency thereof is void. The only exception Tenn. Code Ann. § 39-17-1551 provides, with respect to laws and regulations enacted by cities, counties, and counties having a metropolitan form of government, after March 15, 1994, is for those laws and regulations that regulate the use of tobacco products in buildings owned or leased by such entities.

In short, Tenn. Code Ann. §39-17-1551 expressly preempts the entire field of tobacco regulation by cities, counties, and counties with a metropolitan form of government, except with respect to the use of tobacco products in buildings owned or leased by them. When the state legislature preempts completely a field of regulation, any regulation by a city or county is void. 62 C.J.S. Municipal Corporations § 141 (2007); *see Southern Ry. v. City of Knoxville*, 442 S.W.2d 619, 622 (Tenn. 1968) ("The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict unless the statute limits the requirement for all cases to its own prescriptions."); *City of Knoxville v. Currier*, 1998 WL 338195*1 (Tenn. Ct. App.) (citing *Capitol News Co., Inc. v. Metropolitan Government*, 562 S.W.2d 430, 434 (Tenn. 1978)). Accordingly, neither a city, county, nor a county having a metropolitan form of government is authorized to enact an ordinance that would prohibit smoking in parks owned or leased by them because such an ordinance would not regulate the use of tobacco products in buildings, which is the only type of regulation that a city, county, or county having a metropolitan form of government is permitted to exercise under Tenn. Code Ann. §39-17-1551.

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