

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

YOUTH TOBACCO ACT: Validity of local ordinance raising the
AGE OF MAJORITY ACT: age of persons able to purchase
 tobacco products to the age of 21.

PREEMPTION:

The Age of Majority Act, 1971 PA 79, MCL 722.51 *et seq.*, preempts a city ordinance that provides “a person shall not sell, give or furnish a tobacco product in any form to a person under 21 years of age.” The ordinance directly conflicts with state law by barring the sale or furnishing of tobacco products to 18- to 20-year-olds because the Age of Majority Act prohibits treating these young adults differently from persons 21 years and older with respect to their legal capacity to purchase tobacco products.

Opinion No. 7294

February 2, 2017

The Honorable Rick Jones
State Senator
The Capitol
Lansing, MI 48909

You have asked whether Michigan law preempts a city ordinance that provides that “a person shall not sell, give or furnish a tobacco product in any form to a person under 21 years of age.”¹

The Michigan Constitution gives each city and village the “power to adopt resolutions and ordinances relating to its municipal concerns.” Const 1963, art 7, § 22. And the Constitution further provides that the powers it confers on cities and

¹ Because you inquire only as to the ordinance’s regulation of tobacco products, this opinion does not address the ordinance’s similar prohibition with respect to electronic smoking devices.

villages, along with townships and counties, are to be “liberally construed in their favor.” Const 1963, art 7, § 34. The fact that something is of “state concern” does not foreclose that the issue may also be a local concern. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 190 (2016).

But the power of a city or village to adopt an ordinance is “subject to the constitution and law.” Const 1963, art 7, § 22. The Michigan Supreme Court has determined that the phrase “subject to the . . . law” means that a city’s power to adopt an ordinance is “subject to the laws of this state, i.e., statutes.” *Ter Beek v City of Wyoming*, 495 Mich 1, 19 (2014) (internal quotation omitted). While a local government has the power to adopt ordinances relating to its municipal concerns, those ordinances may be preempted by state law. State law preempts regulation by an inferior level of government where (1) the local ordinance directly conflicts with a state statutory scheme, or (2) the statutory scheme completely occupies the field that the local ordinance attempts to regulate. *Ter Beek*, 495 Mich at 19–20, quoting *People v Llewellyn*, 401 Mich 314, 322 (1977). See also *Rental Prop Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich 246, 257 (1997). A preemption analysis is conducted by looking at how a specific ordinance interacts with existing state law.

Background of Michigan law

In Michigan, the sale of cigarettes and other tobacco products to minors is governed by state law. The Youth Tobacco Act prohibits the sale of tobacco products to a minor: “[a] person shall not sell, give, or furnish a tobacco product to a minor.”

MCL 722.641(1). It also prohibits a minor from purchasing, possessing, or using tobacco products, making it a misdemeanor to violate the law. MCL 722.642(1)(a), (b), (c). The Act defines a minor as an “individual under 18 years of age.” MCL 722.644(a).

At the same time, the Act requires a retailer to post in a conspicuous location a sign informing customers and employees of the prohibition on the sale and purchase of tobacco by minors, and provides the exact language for the sign:

“The purchase of tobacco products by a minor under 18 years of age and the provision of tobacco products to a minor are prohibited by law. A minor unlawfully purchasing or using tobacco products is subject to criminal penalties.” [MCL 722.641(2).]

The purposes of this statutory scheme are outlined in the title to the Act:

AN ACT to prohibit the selling, giving, or furnishing of tobacco products to minors; to prohibit the purchase, possession, or use of tobacco products by minors; to regulate the retail sale of tobacco products; to prescribe penalties; and to prescribe the powers and duties of certain state agencies and departments.

The Department of Community Health oversees the Act, and has the obligation to distribute the signs with the language of the prohibition free of charge to wholesalers and others who sell tobacco products. MCL 722.641(4).

The Youth Tobacco Act was originally passed in 1915, and only governed the sale of cigarettes. 1915 PA 31.² The original act prohibited the sale, as well as the

² The name of the Act was established effective March 30, 1989, when the Legislature added a fifth section to the Act, naming it the Youth Tobacco Act. MCL 722.645.

use, of cigarettes to those under the age of 21. *Id.* This legal standard remained in place for more than 50 years until 1972. The Youth Tobacco Act was amended in that year, substituting “21 years” with “18 years.” 1972 PA 29. This amendment corresponded to the enactment of the Age of Majority Act.

On January 1, 1972, the Age of Majority Act took effect as enacted by Public Act 79 of 1971. The Act declared that “a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age.” MCL 722.52(1). This policy change followed ratification of the 26th Amendment to the United States Constitution, which extended the right to vote to citizens 18 years or older. US Const Am XXVI. The “clear purpose” of the Age of Majority Act was to establish 18 as the age at which “a minor loses the disabilities and protections of his minority and gains the legal status of an adult.” *Michigan Dep’t of Civil Rights ex rel Smilnak v City of Warren*, 136 Mich App 103, 112 (1984).

The Age of Majority Act identified 20 specific acts and provided that it “supersedes all provisions of law prescribing duties, liabilities, responsibilities, rights and legal capacity of persons 18 years of age through 20 years of age *different* from persons 21 years of age.” MCL 722.53 (emphasis added). The list was not exhaustive, as it “includ[ed] but [was] not limited to” the listed public acts. Among the 20 acts, the list expressly included “Sections 1 to 3 of [1915 PA 31, i.e.] sections 722.641 to 722.643,” which is the Youth Tobacco Act. Significantly, section 1 of the

Youth Tobacco Act governs the limits on sales of tobacco products to minors, MCL 722.641, while section 2 governs the purchase, possession, and use of tobacco by minors, MCL 722.642. Section 3, which related to the “harbor[ing]” of minors using tobacco, has since been repealed, MCL 722.643, 1988 PA 314.

In this way, the Age of Majority Act displaced the limitations of the Youth Tobacco Act placed on retailers, eliminating the prohibition on selling cigarettes to those between the ages of 18 and 21. The Youth Tobacco Act was later amended to conform to the Age of Majority Act.

The City’s Ordinance

On July 16, 2016, the City Council for the City of Ann Arbor (City) passed an ordinance amending sections of its city code governing tobacco regulation to provide that “[a] person shall not sell, give or furnish a tobacco product in any form to a person under 21 years of age.” Section 9:328b, Title IX of the Ann Arbor City Code. The City also provided in the following section governing signage that “[a] person who sells tobacco products and or electronic smoking devices at retail and who is subject to the requirements of subsection 9:328(a) shall post a sign adjacent to the sign required by Public Act 31 of 1915 as amended (MCL 722.641 *et seq.*), which includes the following statement”:

“Under City of Ann Arbor ordinance, this store is prohibited from selling or providing a tobacco product to any person under 21 years of age.” [Section 9:329, Title IX.]

In passing this ordinance, the City Council made specific findings in support of this change that “raise[s] the minimum age of purchase,” including:

That raising the minimum legal age for tobacco sales is important to protect the particularly large population of individuals under the age of 21 in the City of Ann Arbor.

* * *

That research has repeatedly found that raising the minimum age of access is an effective strategy for reducing tobacco use among youth and young adults[.] [Section 9:328a, Title IX.]

The City also observed that over 100 jurisdictions in 13 states have raised the minimum legal age for tobacco sales to 21.³ The ordinance went into effect on January 1, 2017.⁴

Direct Conflict Preemption

The first consideration in preemption is whether a local ordinance directly conflicts with state law. A direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits. *Llewellyn*, 401 Mich at 322. An ordinance that regulates in greater detail in an area where a state statute also regulates does not by that fact render the ordinance invalid due to a conflict. *USA Cash #1 v City of Saginaw*, 285 Mich App 262, 267 (2009). As a general rule, “additional regulation”

³ Notably, the federal Centers for Disease Control and Prevention (CDC) has previously identified Michigan as one of 22 states that preempt local limitations regarding youth access to tobacco. See CDC Morbidity and Mortality Weekly Report, (August 26, 2011), available <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm> (accessed January 25, 2017).

⁴ Another state law, the Tobacco Products Tax Act, 1993 PA 327, includes a provision that prohibits local governments from imposing new requirements on tobacco products for distribution purposes. See MCL 205.434. But this provision is not relevant here, as the ordinance governs the sale of tobacco by retailers to consumers.

does not create a conflict. *Walsh v River Rouge*, 385 Mich 623, 636 (1971). The issue is whether both the state statute and the ordinance – even when “covering the same subject” – may be given effect: “a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.” *Rental Prop Owners Ass’n of Kent Co*, 455 Mich at 262.

In examining just the Youth Tobacco Act, the fact that the City imposes a greater restriction on the sale or furnishing of tobacco does not appear to be a direct conflict. A number of Michigan Supreme Court cases have recognized the power of municipalities to enact requirements that go beyond that required by state law. *Rental Prop Owners Ass’n*, 455 Mich at 261–262 (upholding municipal nuisance abatement ordinance); *Detroit v Qualls*, 434 Mich 340, 362 (1990) (upholding ordinance restricting storage quantity of fireworks); *Miller v Fabius Twp Bd*, 366 Mich 250, 256–257 (1962) (upholding ordinance limiting the hours of waterskiing). These cases have each cited approvingly the following treatise passage, holding that municipalities may enact ordinances that are more restrictive than state law:

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the

prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail. [56 Am Jur 2d, Municipal Corporations, § 374, p 408–409 (emphasis added).]

Yet the question here is not just whether the City’s ordinance “enlarges” on the Legislature’s limitations in the Youth Tobacco Act on sales to those under 18 years of age. Rather, the issue is whether it conflicts with the Legislature’s prohibition in the Age of Majority Act of different treatment in specified areas for those between the ages of 18 and 20, and those 21 and older.

No cases in Michigan or elsewhere have addressed the question. Nor has this office addressed this specific issue. Previously, in a question related to tobacco products, Attorney General Frank Kelley concluded local ordinances that regulated the sale of tobacco to minors and the placement of vending machines for cigarettes were not preempted by Michigan law. See OAG No. 6665, p 401 (November 15, 1990). But this opinion did not address any effort to establish an age restriction at 21 years as against 18.

In examining the Youth Tobacco Act and a statutory act for taxing cigarettes that has since been repealed, the opinion concluded that “as a general proposition, state law does not preempt local ordinances designed to prevent tobacco sales to minors nor does it preempt local ordinances that regulate or prohibit the placement of cigarette vending machines.” OAG No. 6665, p 403. The opinion further

explained that “[o]f course, any preemption analysis would depend, in part, on the specific content of the local ordinance in question.” *Id.* Here, the ordinance elevates the age of purchase to 21, even though state law prohibits treating those between 18 and 20 differently from those 21 and over. MCL 722.53 (superseding laws that “prescrib[e] duties, liabilities, responsibilities, rights and legal capacity of persons 18 years of age through 20 years of age different from persons 21 years of age.”) On this issue, there is no precedent in Michigan.

The City’s ordinance directly conflicts with one of the central components of the Age of Majority Act. The Act expressly bars laws that prescribe duties, liabilities, responsibilities, rights and legal capacity of persons who are 18 to 20 years old that are “different” from those who are 21 years old. MCL 722.53. And the Act specifically applied to the three sections of the Youth Tobacco Act, indicating the Legislature’s intent to foreclose different treatment under that particular act. *Id.*

The Age of Majority Act’s rejection of a difference of laws for those between the ages of 18 to 20 years as a class from those 21 years and older was predicated on the existence of a duty, liability, responsibility, right, or legal capacity related to the sale or furnishing of tobacco products. The first section of the Youth Tobacco Act had limited the sale of tobacco products to those under 21 years of age before its revision, MCL 722.641, and thus the reduction of this age to 18 years as a threshold eliminated a liability for the person selling or furnishing. This elimination of the

liability occurred without regard to the age of the seller or person furnishing the product.

As a consequence of the changes to the Youth Tobacco Act corresponding to the Age of Majority Act, a person 18 to 20 years of age has the legal capacity to purchase tobacco products. While the Age of Majority Act does not define “legal capacity,” the edition of Black’s Law Dictionary published after the passage of the Act defines “capacity” as “legal qualification (i.e., *legal age*), competency, power or fitness.” *Black’s Law Dictionary*, (5th ed) (1979), p 188 (parenthetical in original; emphasis added). It is clear that the change in law in 1971 changed the legal age so that those over 18 years of age had the same capacity to obtain tobacco products as any other adult.

The City’s ordinance overturns the Age of Majority Act’s elimination of “different” treatment of the legal capacity of those between 18 and 20 years of age and those 21 years and older to obtain tobacco products. See *Smilnak*, 136 Mich App at 112 (“the clear purpose of [the Act] was to establish 18 as the age at which a minor loses the disabilities and protections of his minority and gains the legal status of an adult”). The ordinance withdraws the legal ability of those between 18 and 21 from purchasing tobacco in Ann Arbor by prohibiting retailers from selling to them. The ordinance raises the age, creating a disability for those 18 to 20 years of age after the Legislature had eliminated it. The Legislature has enacted the policy that 18- to 20-year-olds should be treated like adults 21 years or older for tobacco sales because they cannot be treated “different[ly].” Whether this a wise

policy choice is a matter for the Legislature to determine; the City cannot change it. See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 (2005) (“[P]olicy decisions are properly left for the people’s elected representatives in the Legislature . . .”).

The language of the city council’s finding only confirms the point. In addition to attempting to prevent young adults aged 18 to 20 from providing cigarettes to minors, the ordinance is designed to protect the young adults themselves by “protect[ing]” them from being able to obtain cigarettes. Section 9:328a, Title IX (“That raising the minimum legal age for tobacco sales is important to *protect* the particularly large population of individuals under the age of 21 in the City of Ann Arbor.”) (emphasis added). While this may be a laudable goal, this finding categorizes 18- to 20-year-olds with minors, removing them from the same treatment of other adults 21 years and older.

This effort is plainly contrary to the Age of Majority Act, which is written in the broadest possible terms by stating that a person who is 18 years of age “is an adult of legal age *for all purposes whatsoever*,” MCL 722.52 (emphasis added), and includes the age for purchasing tobacco as one of the ways in which these young adults should no longer be treated as minors.

Any revision in this law must come from the Legislature, as occurred for the purchase and sale of alcohol. In *Findling v TP Operating Co*, 139 Mich App 30 (1984), the Court of Appeals concluded that the general provisions of the Age of

Majority Act in MCL 722.52 did not alter the Liquor Control Act, which limited the ability to purchase alcohol to those who are 21 years of age. *Id.* at 37–39, citing MCL 436.33b (providing before its repeal that “[a] person less than 21 years of age shall not purchase alcoholic liquor, consume alcoholic liquor in a licensed premises, or possess alcoholic liquor, except as provided in section 33a(1) of this act.”)

Originally, the Legislature revised the Liquor Control Act in 1972, like the Youth Tobacco Act, to replace “21 years” with “18 years” to correspond with the Age of Majority Act, but then restored the age of majority to 21 for purchasing alcohol in 1978. *Findling*, 139 Mich App at 38 n 1. The Court explained that the Age of Majority Act “was not intended to preclude *the Legislature* from making distinctions based on the age of 21.” *Id.* (emphasis added), citing *Smilnak*, 136 Mich App at 114. The same is true here. The Michigan Legislature may revisit its decision to ensure that those young adults have the same legal capacity as other adults for the purchase of tobacco products. The City cannot.

It is my opinion, therefore, that the Age of Majority Act, 1971 PA 79, MCL 722.51 *et seq.*, preempts a city ordinance that provides “a person shall not sell, give or furnish a tobacco product in any form to a person under 21 years of age.” The ordinance directly conflicts with state law by barring the sale or furnishing of tobacco products to 18- to 20-year-olds because the Age of Majority Act prohibits

treating these young adults differently from persons 21 years and older with respect to their legal capacity to purchase tobacco products.

A handwritten signature in black ink that reads "Bill Schuette". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

BILL SCHUETTE
Attorney General