



City of North Port

Office of the City Attorney

Amended Memorandum¹

To: Christopher B. Hanks, Mayor
Debbie McDowell, Vice-Mayor
Vanessa Carusone, Commissioner
Pete Emrich, Commissioner
Jill Luke, Commissioner

Copy: Peter D. Lear, City Manager
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From: Amber L. Slayton, City Attorney

Date: September 17, 2019

Re: Regulation of Tobacco

At the February 7, 2019 City Commission Special Meeting, Students Working Against Tobacco (SWAT) made a presentation to the City Commission, advocating that the City restrict the sale of tobacco to persons under the age of 21 and regulate the advertisement of tobacco on store windows and at the point-of-sale. The Commission took a consensus to:

1. Review Alachua County's regulations, have staff and legal meet with SWAT, and get information about how to implement the program; and
2. Have staff look into regulating advertising inside the building at point of sale.

This memo addresses the legal aspects of the Commission's consensus.

SUMMARY

1. Authority to regulate tobacco-related sales and vaping: The State has not preempted the City's home-rule authority to regulate the sale of tobacco products or the use of vapor-generating devices.

¹ On September 10, I provided you with a version of this memo. As this is a hot topic, additional regulations have been adopted since that time. Fort Lauderdale recently adopted a relevant ordinance, and the federal and other state governments have taken action. This memo is amended to include the Fort Lauderdale ordinance and recent nationwide regulations.

2. Authority to regulate advertising: The Federal Cigarette Labeling and Advertising Act preempts the City from regulating advertising related to cigarettes but does not apply to cigars or smokeless tobacco. However, regulations prohibiting the placement of advertisements related to these products violate the First Amendment.
3. Alachua County and other jurisdictions’ regulations: While several Florida localities legislate tobacco in some fashion, Alachua County is the only one that has addressed the legal age for purchase.

AUTHORITY TO REGULATE TOBACCO-RELATED SALES AND VAPING

There are many regulatory components involved in the general sale of tobacco products. Both the federal government and the State of Florida regulate the licensing of distributors, retailers, wholesalers, importers and exporters of tobacco products. The Food and Drug Administration administers the federal licensing program. The State’s licensing program is administered by the Division of Alcoholic Beverages and Tobacco, within the Department of Business and Professional Regulation. The State also regulates sales tax on tobacco products.

While the State has expressly preempted all municipal regulation regarding smoking tobacco products,² a 2019 amendment to the Florida Statutes provides that municipalities are not precluded from adopting ordinances “that impose more restrictive regulation on the use of vapor-generating devices.”³ A *vapor-generating electronic device* is defined as:

[A]ny product that employs an electronic, a chemical, or a mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of a solution or other substance intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.⁴

Further, the State has not expressly preempted local government regulation of the sale or distribution of tobacco products, e-cigarettes, or vaping products.

AUTHORITY TO REGULATE ADVERTISING

Federal Cigarette Labeling and Advertising Act (FCLAA)

The FCLAA prescribes advertising and mandatory health warnings for the packaging of cigarettes and expressly preempts states in this area, by providing that:

² See Fla. Stat. § 386.209.

³ *Id.* (amended by Ch. 2019-14 Laws of Florida).

⁴ Fla. Stat. § 386.203(15) (amended by Ch. 2019-14 Laws of Florida).

No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this chapter.⁵

In analyzing the interplay of the FCLAA and local law, the United States Supreme Court held that under the Supremacy Clause in Article VI of the United States Constitution, the FCLAA preempts states and localities from regulating advertising and promotions of cigarettes based on smoking and health.⁶ The court also noted that the FCLAA preemption does not apply to smokeless tobacco or cigars and does not preempt states and localities from enacting laws on the use and sales of cigarettes.⁷

First Amendment to the United States Constitution

In striking down a Massachusetts regulation related to the advertisement of tobacco and tobacco-related products, the United States Supreme Court found that the State had a substantial interest in curbing the use and access of tobacco products to minors, but that the regulations nonetheless violated the First Amendment:

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.

...

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.⁸

Other Jurisdictions' Regulations

Over the past several years, some Florida counties and municipalities have regulated the sale – but not the advertising – of tobacco products.

Florida Jurisdictions – Miscellaneous Regulations

Examples of Florida ordinances include:

⁵ 15 U.S.C. §§ 1333, 1334.

⁶ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-546, 551 (2001).

⁷ See *id.*

⁸ *Reilly* at 565 (striking down a regulation that prevented advertisement within 1,000 feet of schools and playgrounds).

1. Prohibiting the display, sale, and distribution of tobacco products by self-service means (*i.e.*, vending machines) – Miami-Dade County,⁹ Pasco County,¹⁰ St. John County,¹¹ City of Bristol,¹² City of Calloway,¹³ and City of Jacksonville;¹⁴
2. Regulating the hours of operations of convenience shops, which include tobacco shops – Hillsborough County;¹⁵ and
3. Prohibiting the distribution of free tobacco samples and coupons or other like distribution of tobacco products in public places or at events open to the public – Holmes County.¹⁶

Florida Jurisdictions - Age Restrictions

Two local governments in the State have prohibited the sale of tobacco and vaping products to those youths under the age of 21.

City of Fort Lauderdale

On September 3, 2019, Fort Lauderdale adopted an ordinance regulating the sale of tobacco products. The ordinance took effect immediately. The ordinance provides:

1. It is unlawful to sell, offer for sale, give away, or deliver any tobacco product to a person under the age of 21;
2. Before distributing a tobacco product, the distributor must verify the recipient is at least 21, by examining the recipient's government-issued identification;

⁹ See Sec. 8A-8, Code of Ordinances of the Miami-Dade County (regulates the sale of tobacco products by prohibiting the sale of tobacco products, flavored tobacco products, electronic cigarettes and other nicotine dispensing devices from vending machines).

¹⁰ See Chapter 22, *Business*, Article I, *In General*, Section 22-1, Code of Ordinances of Pasco County. (regulates the merchandising of tobacco products by prohibiting the display, sale, and distribution by self-service means where those under 18 years of age are allowed on the premises).

¹¹ See Ordinance 2000-44, Ordinances of St. John County, Ordinance Book 25, pages 581-583 (regulates the placement and merchandising of tobacco products by prohibiting vendors from placing tobacco products in open display units that are not located in restricted access areas where persons under the age of 18 years are allowed on the premises; restricts the display and sale of flavored tobacco products and requires that sales of such items be made by vendor-assisted sales only, *i.e.*, no vending machines or other self-service means).

¹² See Ordinance #02-01, Ordinances of the City of Bristol (regulates the merchandising of tobacco products by prohibiting the display, sale or distribution of such products by self-service means, such as vending machines, unless those under 18 years of age are not allowed on the premises).

¹³ See Chapter 10, *Offenses and Miscellaneous Provisions*, Article I, *In General*, Sec. 10-10, Code of Ordinances of the City of Calloway (regulates the promotion of tobacco products by prohibiting the display and placement of such products in open display units, such as vending machines, in unrestricted access areas where those under 18 years of age are allowed on the premises).

¹⁴ See Chapter 463, *Children's Access to Tobacco Products*, Part 1, *General Provisions*, Sec. 463-101, et al., Code of Ordinances of Jacksonville (prohibits the sale of tobacco products and cigarette wrappers to and prohibits the use and possession of such products by persons under age 18; prohibits the sale of such products by vending machines).

¹⁵ See Chapter 10, *Business*, Article V, *Tobacco Dealers*, Section 10-33, Code of Ordinances of Hillsborough County.

¹⁶ See Ordinance #10-03, *Tobacco Free Sampling and Distribution Ordinance* of Holmes County.

3. All persons selling tobacco products must post a sign stating that, “The sale of tobacco products to persons under the age of 21 is against City of Fort Lauderdale law. Proof of age is required for purchase.”;
4. Self-service sales (*i.e., vending machines*) are prohibited for tobacco products, unless access to the premises by persons under 21 is prohibited.

Alachua County

On January 22, 2019, Alachua County adopted an ordinance regulating the sale of tobacco products. The ordinance becomes effective October 22, 2019, providing for period of nine (9) months to implement.

The ordinance also provides for:

1. The prohibition of local businesses from selling and distributing tobacco products and vaping products to anyone under 21 years of age;
2. A licensing and inspection program for the sale of such products; the program includes a fee based on administrative costs, enforcement costs, and retailer education and training programs;
3. Signage required to provide notice that the sale of such products is prohibited to those under age 21;
4. Enforcement of the ordinance;
5. The prohibition of self-service merchandising, *e.g., vending machines*, unless those under age 21 are not allowed on the premises; and
6. Limited exceptions for those under age 21 who work at retail businesses selling tobacco products, e-cigarettes or vaping products, or who are working under the supervision of law enforcement staff for training, education research and enforcement purposes.

Nationwide Regulations

1. Federal¹⁷ – On September 11, 2019, the Health and Human Services Secretary said that the Food and Drug Administration would outline a plan within the coming weeks for removing flavored e-cigarettes and nicotine pods from the market, excluding tobacco flavors. The ban would include mint and menthol, popular varieties that manufacturers have argued should not be considered flavors.
2. State of Michigan¹⁸ – On September 4, 2019, Michigan became the first state in the nation to ban flavored e-cigarettes.

¹⁷ <https://www.nytimes.com/2019/09/11/health/trump-vaping.html?module=inline>

¹⁸ https://www.washingtonpost.com/health/michigan-becomes-first-state-to-ban-flavored-e-cigarettes/2019/09/03/34f234c6-ce4c-11e9-8c1c-7c8ee785b855_story.html

3. State of New York¹⁹ - In July 2019, the governor signed a bill raising the age to 21 for anyone buying tobacco or electronic-cigarette products. The prohibition takes effect in November. On September 15, 2019, the governor announced an emergency executive order to ban the sale of flavored e-cigarettes.
4. State of New Jersey²⁰ – In September, New Jersey’s Senate president, Stephen M. Sweeney, took the effort to curb e-cigarette use even further by introducing legislation that would ban the sale of all electronic smoking devices. The legislation is still pending.

¹⁹ <https://www.nytimes.com/2019/09/15/nyregion/vaping-ban-ny.html>; <https://www.webmd.com/mental-health/addiction/news/20190912/white-house-moves-to-ban-flavored-e-cigarettes>

²⁰ <https://www.nytimes.com/2019/09/15/nyregion/vaping-ban-ny.html>